United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20734

MARY G. STANSBURY, Administratrix of the estate of JOSEPH STANSBURY,

Appellant,

v.

CASUALTY HOSPITAL, A Corporation,

Appellee.

Appeal from the United States District Court for the District of Columbia

JOHN P. ARNESS
815 Connecticut Avenue
Washington, D.C. 20006

CARL L. TAYLOR
815 Connecticut Avenue
Washington, D.C. 20006

Attorneys for Appellee

HOGAN & HARTSON
Washington, D.C.
Of Counsel

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON D. C. 20001

QUESTION PRESENTED

Whether the trial court, in granting judgment N.O.V., properly determined that there was no evidence upon which the jury could reasonably have found the appellee negligent.

INDEX

TABLE OF CASES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20734

MARY G. STANSBURY, Administratrix of the estate of JOSEPH STANSBURY,

Appellant,

v.

CASUALTY HOSPITAL, A Corporation,

Appellee.

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

RESTATEMENT OF THE CASE

Appellant's decedent (hereafter called "Stansbury") went to the appellee Casualty Hospital (hereafter called "the Hospital") shortly before 7:30 p.m. on December 8, 1962 [JA 105] for treatment of a heart condition [JA 21]. The doctor who examined him ordered bed rest with an oxygen tent [JA 36, 105]. Before going up to bed, Stansbury, who had been driven to the Hospital by his

son, went back outside and told the latter not to wait because he was being admitted [JA 32].

When Stansbury arrived at his room, an orderly had already put up the oxygen tent [JA 96], which had a red sign on it that said "no smoking" [JA 93]. The orderly helped him to finish undressing because he appeared a little weak [JA 92], and gave his clothes to a nurse [JA 93]. While helping him, the orderly asked him if he had any matches or cigarettes, to which he replied that he did not [JA 92-93]. When Stansbury was put in bed, he was dressed only in a hospital gown, and he had no cigarettes in his hands [JA 97]. As the orderly was putting him in the bed, he told Stansbury that he was not allowed to smoke while he was in the oxygen tent or while the tent was in the room [JA 93, 94]; Stansbury responded that "he knows that he wasn't allowed to smoke because he had been in the hospital before" [JA 94]. Before Stanbury's arrival, the orderly had warned the other two patients in the room not to smoke because of the oxygen tent, and they had indicated that they understood [JA 98]. Upon leaving the room, the orderly placed a sign on the outside of the door similar to that on the tent [JA 95].

The nurse in charge of Stansbury's floor [JA 40] also spoke with him when he was placed in the tent. She told him not to smoke because was in an oxygen tent, and he replied that he "would listen" to the warning [JA 102]. At 10:00 p.m. she saw him again to give him a sleeping pill, which he took [JA 106].

About 10:15 p.m. [JA 105], the nurse was in the narcotics closet next to Stansbury's room [JA 104]. She heard a strange sound coming from his room and asked one of the nurse's aides to check it [JA 104]. When the aide yelled "fire," the nurse went into the room and found Stansbury with his gown on fire [JA 104]. The nurse disconnected the oxygen and smothered the fire with a

blanket [JA 104]; in the process she was herself severely burned on both of her hands [JA 48].

Immediately after the fire had been extinguished, the nurse asked Stansbury what had happened, and "he said he tried to get a cigarette lit and all of a sudden it caught fire" [JA 104]. When the Hospital's supervising nurse [JA 40] arrived, she spoke with Stansbury, who was then lying on his bed in the hall outside his room [JA 46-47]. She did not ask him what had happened, but as she was talking to him she noticed a package of cigarettes lying on the bed beside him [JA 47, 48].

His son visited him about 8:00 the next morning, and found Stansbury awake but unaware of his son's presence [JA 33]. Sometime the same morning, an orderly who had not previously talked to Stansbury [JA 109] asked him what had happened; he answered that "he decided to get a couple draws of a cigarette and when he struck his match, that was it" [JA 110].

Later the same month, an employee of the Southern Oxygen Company was in the Hospital [JA 107] on a routine business call [Tr. 207]. He learned at that time that there had been a fire involving an oxygen tent [JA 107] and, together with the Hospital administratrix and assistant administrator, he went up to see Stansbury [JA 107-08]. The administratrix "asked the patient if he had lit a cigarette, and he said that he had, and she asked him why he had done it, and his reply was, that it was a very foolish thing to do" [JA 108]. The oxygen company employee's recall was "not an exact quotations [sic], but this is in essence of what [sic] he said" [JA 108]. The oxygen company employee then inspected the equipment involved in the fire and found nothing functionally wrong with it [JA 108].

Stansbury himself remembered nothing from the moment when the examining doctor concluded that he should

be admitted [JA 27] on December 8th until he discovered some five or six weeks later that he had been burned [JA 23].

> Q. You don't know when it happened, I take it? A. No, sir, I don't.
>
> The last thing I remember, just like I said, is when this doctor looked me over and then admitted me in the hospital.
>
> Q. When the doctor looked you over, were you in a room then or had you been assigned to a room? A. No, I was right there.
>
> Q. You had just come into the hospital? A. Just come into the hospital.
>
> Q. Were you still dressed in your street clothes? A. That's right.
>
> Q. And that is the last thing you remember for five or six weeks? A. That's right.

[JA 25.] He concluded from his inability to remember that he "must have blacked out" immediately after the doctor's examination [JA 22]. He died before trial, and his testimony was presented by way of deposition [JA 21].

Several witnesses were questioned during appellant's case concerning "the usual routine precautions that are taken regarding the safety of patients while they are in oxygen tents" [JA 63]. The first was the Hospital's supervising nurse the evening of the fire. She answered that if the patient is coherent he is cautioned not to smoke and any matches he may have "are taken away from [him] in that they are kept with [his] personal effects" [JA 44]. The second was a practical nurse who had worked at several hospitals in the area other than Casualty [JA 62]. She said nothing about instructions to the patient, but indicated that if the patient "is sort of senile and you might have a problem with this particular patient, removing things from the bedside, then

you are ordered not to leave anything inflammable in that patient's room" [JA 63]. Finally, a resident at the Hospital when the fire occurred [JA 66] stated that "The patient is instructed not to smoke or try to smoke. . ." [JA 67]. All three witnesses agreed that signs should be put up warning other persons not to smoke [JA 47, 63, 67].

SUMMARY OF ARGUMENT

There was a complete absence of evidence to support appellant's contention at the trial that the Hospital had failed to exercise care, skill, and diligence commensurate with Stansbury's condition as known to the Hospital. The uncontroverted evidence showed that the fire occurred because Stansbury attempted to light a cigarette after having been warned not to do so. The uncontroverted evidence also showed that Stansbury appeared to comprehend the warnings, and that he spoke and acted rationally at all times between his admission and the fire. The uncontroverted evidence further showed that the warnings given Stansbury and the other precautions taken by the Hospital were in full conformity with the standard of care customarily exercised by hospitals generally in the community to protect rational patients in oxygen tents from the danger of accidental explosion. There was nothing to suggest to the Hospital that Stansbury would act in reckless and wanton disregard for his own safety.

ARGUMENT

The standard of care chargeable to the Hospital is that set forth in *Garfield Memorial Hospital* v. *Marshall*, 92 U.S.App.D.C. 234, 239, 204 F.2d 721, 726 (1953):

> In general it is the duty of a private hospital to give a patient such reasonable care and attention as the patient's known condition requires. This duty

> is measured by the degree of care, skill and diligence customarily exercised by hospitals generally in the community, and by the express or implied contract with the patient. [Citations omitted.]

Appellant accepts this standard in contending in her brief, at page 14, that:

> The jury then apparently found that the appellee hospital failed to use such reasonable care and failed to give such reasonable attention for decedent's safety as his mental and physical condition required and that the care given was not commensurate with the known condition of the patient and his ability to take care of himself.

But no evidence was presented from which the jury could have made such a finding.

Judge Keech, in his memorandum granting judgment N.O.V. to the Hospital, succinctly described the contrast between appellant's contentions and the evidence [JA 16-17]:

> In essence, the plaintiff's position is that his condition was such as to require that the defendant not only warn the plaintiff as to no smoking but take whatever steps might be necessary to absolutely prevent any attempt by him or anyone else to smoke in the room. All of the evidence shows without challenge that the plaintiff's act caused the fire. There is no evidence that anyone else in the room or anyone who may have come into the room was smoking or attempting to do so.
>
> The record is unchallenged that the plaintiff was timely warned and that he comprehended such warning. Plaintiff's counsel attempts to show that he suffered a blackout prior to the fire. This theory was first presented when plaintiff's deposition was taken on January, 1964 (months after the occurrence on December 7, 1962), when the plaintiff is recorded

> as having testified that he must have blacked out, as he couldn't remember anything from the time he was examined in the emergency room to a point five or six weeks later. The record is replete with evidence that the plaintiff spoke and acted rationally at all pertinent times. Even assuming the conclusion of the plaintiff to be accurate, the record is also replete with evidence to the effect that up to the time of the fire the defendant was without any information by way of word or action which did or could have put defendant on notice as to any absence of mental capacity of the plaintiff from any cause. All of the evidence was to the contrary. The record discloses that the plaintiff was checked upon at intervals and that he was last checked as being "OK" fifteen minutes prior to the fire.

Stansbury was quite definite at his deposition in fixing the point at which he "must have blacked out," stating several times that the admitting examination was the last thing he could remember [JA 22, 25, 27]. Yet, if he was thereafter mentally incapacitated, it was not apparent even to his son, who should have been quick to notice it. By his testimony that his father walked back outside the Hospital and told him not to wait because the Hospital was going to admit him, the son poignantly established that Stansbury was then displaying consciousness of his surroundings, memory of recent past events, and an ability to reason.

The testimony concerning the precautions taken by the Hospital personnel to prevent accidental combustion of the oxygen in Stansbury's tent was uncontroverted. These precautions fully conform to the "degree of care, skill and diligence" established by appellant's evidence. The known condition of the patient, Stansbury, gave the Hospital personnel no indication that he was so mentally incapacitated as to do an act which must be objectively considered suicidal.

The situation presented by this case is analogous to that in *Meehan* v. *United States*, 180 F.Supp. 171 (S.D. N.Y.), *aff'd*, 274 F.2d 433 (2d Cir. 1959), which involved an action brought under the Tort Claims Act to recover for the death of a patient at a Veterans' Hospital. Plaintiff's case showed that while the mental history of the deceased was such that he had been placed in a closed ward was upon his arrival at the hospital, his first week had been uneventful and he appeared to be improving. As the patient was being escorted by an orderly from his ward to a laboratory in another part of the hospital, the patient "bolted ahead and hurled himself through an unbarred window." Plaintiff introduced evidence that no physical restraints were used in escorting the deceased, although they were available, and that the orderly did not even have his hands on the deceased at the time. The Court held that the plaintiff had failed to make out a prima facie case because "there is no testimony in the record to indicate that on the day of the accident sound judgment dictated that restraints be used." 180 F.Supp. at 172. Similarly, in the present case, while it is easy to say with hindsight that the hospital should have searched Stansbury's bedding to thwart an attempt to secrete cigarettes, or used physical restraints to secure his arms, or posted a continuous watch over him, or perhaps all three of these measures, there is nothing in the record to put the Hospital personnel on notice that such extreme measures were needed to prevent Stansbury from wreaking destruction upon himself.

CONCLUSION

For the reasons stated, the trial court properly granted judgment N.O.V., holding that there was no evidence upon which the jury could reasonably have found that the Hospital personnel had been negligent.

Respectfully submitted,

JOHN P. ARNESS

CARL L. TAYLOR
815 Connecticut Avenue
Washington, D.C. 20006

Attorneys for Appellee

HOGAN & HARTSON
Of Counsel

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,734

F 459

MARY G. STANSBURY, Administratrix
of the estate of JOSEPH STANSBURY,

Appellant,

v.

CASUALTY HOSPITAL,
A Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

A. Lillian C. Kennedy
Mabel D. Haden

506-A Fifth Street, N. W.
Washington, D.C. 20001

Attorneys for Appellant

STATEMENT OF QUESTIONS PRESENTED

Whether it was error for the Court below to grant appellee a Judgment Notwithstanding the Verdict after the jury had resolved the factual issues based on the evidence and on the instructions by the Court and has brought back a verdict for appellant?

INDEX

TABLE OF CASES

INDEX

TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,734

MARY G. STANSBURY, Administratrix
of the estate of JOSEPH STANSBURY,

Appellant,

v.

CASUALTY HOSPITAL,
A Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was plaintiff below in a Civil Action in which she was substituted as Administratrix of the estate of her deceased husband, Joseph S. Stansbury, who filed suit for damages during his lifetime as a result of injuries sustained while a patient in the Casualty Hospital, defendant below.

The case was tried before a jury who on September 19, 1966 brought back a verdict for appellant. Subsequently, appellee filed a Motion for a Judgment Notwithstanding the Verdict. Over the appellant's objections, the motion was granted and the Honorable Judge Richmond B. Keech vacated the judgment for appellant and entered judgment in favor of appellee on October 17, 1966.

Notice of Appeal was seasonably filed and appellant's Record below and stenographer's transcript of the trial proceedings were duly lodged in this Court.

The jurisdiction of this Court is invoked under the provisions of Title 17, Section 101, D. C. Code, 1961 Edition.

STATEMENT OF THE CASE

One Joseph S. Stansbury died intestate on February 28, 1965. The appellant wife is the duly appointed and qualified Administratrix of his estate. On or about December 7, 1962, the defendant was admitted as a heart patient to appellee hospital and while a patient in said hospital was seriously burned about the face, neck, chest and both arms while in an oxygen tent. The decedent filed a complaint during his lifetime on or about August 8, 1963 against appellee for damages for personal injuries resulting from appellee's negligence. Decedent was hospitalized approximately seven (7) times as a result of the burns prior to his demise. Upon decedent's demise, the action was continued under the Survival Statute. The case was tried on September 15, 16, and 19, 1966 before a jury. Appellant alleged and proved to the satisfaction of the jury that decedent's injuries were due to the negligence or failure on the part of appellee to exercise the degree of care required of it or commensurate with the known inability of the patient to take care of himself while in an oxygen tent; that the appellee failed to take the precaution of not allowing anybody to smoke in the vicinity of an oxygen tent which was or should have been known to appellee to be a dangerous instrumentality when improperly used.

The jury retired after the end of all the evidence and the instructions by the Court and returned approximately three (3) hours later with a verdict for the appellant in the sum of $17,120.50. Subsequently, appellee made a motion for judgment notwithstanding the verdict which motion was granted on October 17, 1966.

From the aforementioned Ruling and Final Order granting appellee a Judgment Notwithstanding the Verdict, appellant brings this Appeal.

STATUTES INVOLVED

Title 17, Section 101, of the District of Columbia Code, 1961 Edition dealing with Jurisdiction and Method on Appeal to the United States Court of Appeals for the District of Columbia Circuit, by any party aggrieved by a final Order of the United States District Court for the District of Columbia.

Survival Statute

Title 12, Sec. 12-101, D. C. Code, 1961

On the death of any person in whose favor or against whom a right of action may have accrued for any cause prior to this death, said right of action shall survive in favor of or against the legal representative of the deceased, Provided, However, that in tort actions, the said right of action shall be limited to damages for physical injury except for pain and suffering resulting therefrom (March 3, 1901, 31 Stat. 1227, Ch. 854 Sec. 235, June 19, 1948, 62 Stat. 487, Ch. 508, Sec. 1).

STATEMENT OF POINTS

It was error for the Court to grant appellee a Judgment Notwithstanding the Verdict since the jury had resolved the factual issues based on the evidence and on the instructions by the Court.

SUMMARY OF ARGUMENT

From the evidence adduced in Court at the trial of this case on the question of negligence by the appellant, which evidence was strengthened by the appellee's evidence and admissions the question of negligence was properly submitted to the jury for its determination. From the aforementioned evidence coupled with the Court's instructions, the jury was justified in bringing back a verdict for the appellant although the award was nominal considering the seriousness and permanency of the injuries sustained by the decedent and the medical expenses incurred.

Appellant concludes that it was error for the Court to grant appellee a Judgment Notwithstanding the Verdict.

ARGUMENT

The appellant adduced evidence from eight witnesses including the depositions taken by the decedent, Joseph S. Stansbury during his lifetime as the transcript of the trial proceedings will show.

The decedent, Joseph S. Stansbury, was called by the appellee during his lifetime, and after having been duly sworn by the Notary Public, was examined and testified. The entire deposition which is a part of the Record before this Court, with the exception of the first question and first answer on page 19 of the depositions was read to the jury. There was no objection by the appellee except as to the first question and first answer on page 19 of the depositions, which was sustained by the Court and consequently was not read.

> Q. On December 7, 1962, did you go to Casualty Hospital?
> A. Yes.
>
> Q. Why did you go to Casualty Hospital?
> A. This heart condition.
>
> Q. How did you go to Casualty Hospital?
> A. My son carried me. I called my son and I told

him, I said, "Tommy, you had better get here mighty fast because I can't breathe and I've got this terrible pain around my heart." (JA 21)

Q. And when you went to the door at Casualty Hospital where did you go then?

A. Well, the lady at the desk right inside as I walked in, she called this doctor and he examined me. After that I must have blacked out. I don't know anything else.

Q. You don't remember anything else?

A. I don't remember anything else. (JA 22)

Q. What is the next thing you remember?

A. I guess about five or six weeks afterwards and then I realized that I was burned. (JA 23)

Q. Do you ever remember being in an oxygen machine?

A. No, sir.

Q. Or in an oxygen tent?

A. No, sir. (JA 24)

Q. The only thing as I understand that you recalled is that five or six weeks after you went to the hospital you became aware of the fact that you had been burned?

A. Burned, yes.

Q. You don't know how it happened, I understand?

A. No, I don't.

Q. You don't know when it happened, I take it?

A. No, sir, I don't.

The last thing I remember, just like I said, is when this doctor looked me over and then admitted me in the hospital.

Q. When the doctor looked you over, were you in a room then or had you been assigned to a room?

A. No, I was right there.

Q. You had just come into the hospital?
A. Just came into the hospital. (JA 25)

Q. Were you still dressed in your street clothes?
A. That's right.

Q. And that is the last thing you remembered for five or six weeks?
A. That's right. (JA 25)

Q. That is all you recall?
A. And I guess everything blacked out.

Q. Do you know how the oxygen tent got on fire?
A. No. (JA 27)

Q. As I understand it, you don't recall anything about this accident?
A. No. The only thing, the last thing I can recall is when that doctor examined me.

Q. That is when you first went into the hospital?
A. That is when I just went into the hospital.

Q. And you still had your street clothes on?
A. That's right.

Q. And you recall him saying put this man in bed right away?
A. Yes, and that is the last thing I heard him say.

Q. And then the next thing you recall is what?
A. I was burned. (JA 28)

The decedent's son, one Thomas Stansbury testified that he carried his father to the appellee hospital and that at the time the only scars he had on his body was an appendectomy scar; that the next day he went back to see his father whom he did not believe to be conscious; that he was burned over his face, neck, chest and side (JA 32, 33).

He testified that of his own personal knowledge the decedent was hospitalized at least seven or eight times during his lifetime as a result

of these burns; that he saw the decedent the day before he passed on February 28, 1965 and that he still had many scars over his body; that his neck never did heal properly and that when he turned his neck, he had toturn his whole body in order to turn around (JA 34).

Miss Marjorie Willoughby from the Casualty Hospital brought the records kept in the regular course of business. She testified that the decedent was,

> ". . . Admitted to medical service and complete bedrest with side rails, O-2 tent.
>
> Q. Please tell us what O-2 tent means.
> A. I understand it means oxygen tent.
> One thousand chloric, 200 milligrams sodium diet. Sodium nembutal, 100 milligrams, P.O.H.S., milk of magnesia, 30 cc's, H.S.
>
> Blood pressure and pulse rate, respiratory rate, Q-4 hours. Rectal temperature, QID, and ace bandage to both legs to mid thighs.
>
> Chest x-rays in a.m. when feasible. EKG in a.m. C.B.C. and urinalysis, F.G.O.T. in a.m. FBS and BUN in a.m. Digitalis, (Hold leave). 100 milligrams, P.O.T.I.D. for the first five consecutive days and then 1 Q.I.D.
>
> Diurelm 0.5 grams, P.O.B.I.D.
>
> Mercuhydrim, 2 cc's.
>
> . . . Aminophylline, rectal suppositories 500 milligrams, Q.6-H.
>
> Potassium chloride, 1 gram, D.I.B. phenobarbital 15 milligrams, D.I.T. Demerol, 75 milligrams . . .
>
> * * *
>
> Q-4 hours, P.R.N. for severe dyspnene. Chart intake and output and then it is signed by Dr. Pajarrillo. (JA 36, 37)

Mrs. Gertrude F. Emert, a registered nurse at appellee hospital for 20 years and supervisor on duty at the time the decedent Joseph S. Stansbury, was a patient there, was called to testify:

> Q. Could you tell us whether or not Mr. Stansbury was left unattended when he was placed in this oxygen tent?
>
> A. I couldn't answer that. I was not there full time. (JA 42)
>
> Q. Are the aides or nurses specifically instructed to see that patients don't have any matches?
>
> A. Well, they are not taken away from them if that is what you mean. They are told not to smoke, but you don't take them away when they are coherent and know what they are doing. (JA 44)
>
> Q. Did you notice whether or not there were any signs on the door of Mr. Stansbury's room?
>
> A. Really I can't answer specifically. As I say, I didn't notice at the time because there were other things I had to do. They go up with the tent. They are put up but I couldn't — (JA 47)

Dr. James W. Braden, Chief Surgeon of appellee hospital testified that he operated on the decedent who sustained third degree burns. (JA 50) He testified that the decedent's chin was drawn down against his chest from the scar tissue, the burn; that he was disabled insofar as work was concerned from the first time he saw him through May 6, 1963 from April 15th through May 6 of the following year. (JA 51-52) He testified that the reasonable value of the services rendered to the decedent was in the sum of $750.00 (JA 57).

Dr. Joseph Rogers Young, Chief of Staff at Casulaty Hospital who testified described examinations and various skin graft operations performed on the decedent (JA 52-54). Dr. Rogers Young stated that the value of his services for surgery and care was One Thousand Dollars ($1,000.00).

Mrs. Rosa Lee Mims, a licensed practical nurse for the Bureau of Public Health in the District of Columbia and who is also licensed to practice in Maryland and Virginia took the stand and testified:

She stated that she had worked in five different hospitals (JA 62). She stated that in the past ten years she had supervised the care of approximately 100 patients being given oxygen; that she had worked as a nurse at D. C. General Hospital, Washington Hospital Center, Children's Hospital, Georgetown Hospital and Holy Cross Hospital.

> Q. Now, are you able to state what are the usual routine precautions taken regarding the safety of patients while they are in oxygen tents?
>
> A. Yes, employees are instructed to always put a sign on the door entering the patient's room, no smoking, oxygen is being used or oxygen is in use. All matches or anything that is inflammable are to be taken away from the patient and the patient's room.(JA 63)

> Q. Now, are patients ever left alone for long periods of time?
>
> A. No, patients that are in oxygen tents usually are pretty sick patients and they most times try to get someone to special these patients that are in oxygen tents, but if enough employees are not available in order to have this patient specialed, whoever, is working on the floor is supposed to check on this patient at regular intervals.: (JA 63-64)

Miss Helen Kelleher from the business office at Casualty Hospital brought to Court the financial records for charges for decedent's hospitalization. She testified that from December 8, 1962 until decedent's last admission, February 5, 1965, the total bill was Seven Thousand Four Hundred Twenty Dollars and Fifty Cents ($7,420.50).

Dr. Enrique Garcia testified relative to the treatment and the skin graft treatments of the decedent in which he, Dr. Garcia, participated. (JA 68)

The appellant prior to resting her case, renewed her motion to have certain photographs showing decedent's disabilities admitted into evidence, which motion was denied and the Court said:

> "I think the record, as now constituted, clearly shows that the situation was through very competent doctors and what was done, seeking to correct that condition, and the fact that there was some limitation thereafter." (JA 69)
>
> * * *
>
> ". . . I feel they are not admissible. . . ." (JA 69

Earlier during the trial appellant had called one Mr. Davis from Chase Studio who had taken pictures showing the decedent's disabilities, but at appellee's suggestion he was not permitted to testify. (JA 30-31) The Court held that the pictures "do seem inflammatory at this time." Hence the jury was never permitted to see the pictures nor to hear about the pictures from the photographer who was excused.

There was a stipulation between counsel that Mary G. Stansbury was the duly appointed administratrix of the decedent's estate and that she was serving in that capacity. (JA 20) There was also a stipulation that there was a fire in or about the oxygen tent and hence to save time the fire marshal was not called (JA 20). The Hospital records kept in the regular course of business were received by stipulation into evidence.

The appellant rested its case and the Judge, over appellant's objections directed a verdict for appellee insofar as the theory of *res ipsa loquitur* was concerned, but permitted the case to go to the jury on the question of negligence (JA 90). The Court said:

> "If it be believed by the jury, that this man did black out, and if they believe that the cigarettes were found in his bed, did they under all of the circumstances, including the black out, take reasonable steps for the protection of the man? . . . but under these circumstances I do think it is a question for the jury whether under all the facts and circumstances your principal did exercise reasonable care." (JA 90)

The appellee called a witness named Robert Franklin Stewart, an orderly who had worked for the appellee Casualty Hospital for 17 years, on cross examination and in response to an inquiry as to whether the decedent, Mr. Stansbury was in the bed before or after he allegedly put the no smoking sign on the door, he replied:

> A. Was in the bed. He was in the bed because I had to put him in the oxygen tent and get the thing started because he looked like he was very weak, shortening of breath. (JA 95)
>
> Q. Do you recall how many other people were in the room?
> A. It was two other patients.
>
> Q. So there were three people in the room?
> A. After I put him in there, he made three.
>
> Q. Do you know whether any one was smoking in the room when you put him in there?
> A. Not to my knowing. (JA 98)
>
> Q. You don't know whether they had cigarettes in there or not, do you?
> A. No, I don't. (JA 98)

The appellee called one Miss Bing Sum Kim who was the nurse on duty at Casualty Hospital the evening the decedent was burned. Miss Kim had great difficulty with understanding and speaking the English language at the time of the trial. She misunderstood the simplest questions put to her:

> Q. THE COURT: What do you mean, did he or did he not understand what you meant?
> A. What kind of condition he asking to me, I cannot — I don't know which level he ask. (JA 100)
>
> Q. Who spoke, you or Mr. Stansbury, or both?
> A. I am sorry, I don't understand. (JA 101)
>
> Q. Does that record that this lady, this clerk, makes out on the basis of what you tell her, and that you read over and then sign if it is correct, does that show or

keep a record of some of the times that you see a particular patient?

A. I don't understand, I am sorry. (JA 103)

Q. Did you see him smoking?

A. No. (JA 105)

Q. Then who was supervising it while he was under the tent? Were you in charge of the oxygen tent?

A. For the patient, yes.

Q. The patient could not operate it himself?

A. Oh, no. (JA 105-106)

In Chambers when presenting certain instructions for the Jury, the Court denied appellant's instruction No. 24: "in the light of counsel's statement that he is not going to contend, by argument or otherwise, that your man was contributorily negligent." (JA 114)

The Court instructed the jury as follows:

"As to the matter of deposition: In the present action certain testimony has been read to you by way of deposition. You are instructed that this testimony is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand, and you are not to discount it merely because it comes to you in the form of a deposition." (JA 117)

The Court further instructed the jury as follows:

"You are further instructed that intent is not an essential element of negligence, neither intention to injure another person nor intention to violate the law nor intention to do or not to do any particular act is necessarily involved, although it may be involved from the failure to exercise ordinary care.

"I repeat to you the duty on the part of the hospital is to exercise reasonable care for the safety of patients under the known circumstances as have been shown to

you, and as you may conclude, and not counsel and not the Court.

"You are further instructed that oxygen vapors are inflammable and may be explosive when used under certain circumstances without safeguards. It, therefore, was the duty of both the plaintiff and defendant to exercise reasonable care in connection with it under all the facts and circumstances in the case.

"In general, it is the duty of the hospital to give a patient such reasonable care and attention as the patient's known condition requires, and this duty is measured by the degree of care and skill and diligence customarily exercised by hospitals generally in the community under similar circumstances, and the hospital owes to a patient such reasonable care and attention for their safety as their mental and physical condition, if known, may require, and that this care should be commensurate with the known condition of the patient and the effect, if any, on his ability to take care of himself.

"To sum up, it is the duty of a defendant to exercise reasonable care for the safety of its patient, such care as would a reasonable hospital, through its agents, servants or employees exercise for the safety of its patients under the same circumstances.

"Now, this makes it necessary for the Court to define for you what is meant by negligence, or what constitutes negligence.

"Negligence is the doing of some act which is reasonably prudent person, under the same circumstances would not do or failure to do something which a reasonably prudent person would do under the same circumstances, activated by those considerations which ordinarily regulate the conduct of human affairs." (JA 119-120)

The Court further instructed the jury as follows:

"You are not to be motivated in reaching your ver-

> dict by any bias or prejudice for or against either party, and similarly you are not to be motivated by any sympathy." (JA 121-122)
>
> "I should advise you that under the statute in the District of Columbia, a plaintiff in a survival action is not entitled to recover for any pain and suffering which he might have suffered, even if it be the proximate result of defendant's negligence." (JA 122)

Appellant has seen fit to give resume of the evidence submitted to the jury, the stipulations between counsel and certain portions of the Court's instructions, in order to show that the jury was justified in bringing back a verdict for the appellant.

The Court in its memorandum granting appellee a judgment n.o.v. said that "there was no evidence which would justify a finding of negligence or a finding that any assumed negligence proximately caused the fire and resulting injuries. Thus, the verdict of the jury had to be based on pure conjecture or speculation, or possibly sympathy."

It would appear that this opinion transgressed the domain of the jury since the jury is a fact finding body. The jury apparently found the decedent's testimony in the deposition taken during his lifetime to be credible. The decedent said many times that he "blacked" out shortly after being admitted and did not remember anything for the next 5 or 6 weeks. The jury then apparently found that the appellee hospital failed to use such reasonable care and failed to give such reasonable attention for decedent's safety as his mental and physical condition required and that the care given was not commensurate with the known condition of the patient and his ability to take care of himself.

There was no conjecture or speculation by the jury, the hospital records stated that the fire was caused by the careless use of a match near or around an oxygen tent.

Appellant introduced evidence to show that heart patients in oxygen tents should be carefully watched and that all matches, cigarettes and inflammables should be taken out of the patients' reach. The jury apparently found that it was negligent on appellee's part to permit matches

and cigarettes to be left on patient's bed where Nurse Emert testified they were found.

The jury apparently also found that it was negligent to have a non-English speaking nurse in charge of a ward and reached the conclusion that if she could not understand simple words four years later, and could not convey clearly in the English language what happened 4 years after the accident, that she was perhaps less coherent in December 1962.

It was impossible for the jury to have been motivated by sympathy. The appellant wife did not even testify. The photographer was not permitted to testify and the pictures were excluded from the evidence.

The Court erred in stating that "the record is replete with evidence that the plaintiff spoke and acted rationally at all pertinent times." On the contrary, the record is replete with the decedent's statement that he blacked out prior to being placed in an oxygen tent and remembers nothing further for a long period of time. The orderly Stewart said he was breathing hard and needed oxygen badly. Nurse Kim said he didn't say anything.

> Q. What did he say to you?
> A. He didn't say much. He didn't ask me anything. I told him — (JA 102)

There was some testimony about what the decedent allegedly said the next day after the fire. However, the jury apparently did not place much credibility in that testimony since the hospital records show that he was given last rites by one Father Bryan at 12:10 p.m. (JA 106). His son also testified that he appeared unconscious when he visited him the next day.

Appellant maintains that the case was properly submitted to the jury on the question of negligence and the jury's verdict should stand.

In *Koninklyke Luchtvaart Maatschappy N.N. KLM Royal Dutch Airlines Holland, et al. v. Gertrude Owen Tuller, et al.*, 110 U.S. App. D.C. 282, 292 F.2d 775, the Court said:

> "On motion for directed verdict, case should go to the jury, if, on evidence, construed most favorably to plaintiff, reasonable men might differ, but motion should be granted if no reasonable man could reach verdict for plaintiff."

In the case at bar twelve (12) reasonable men reached a verdict for the appellant in a reasonably short time and without any apparent difficulty.

This Court said in *McWilliams v. Shephard, et al.*, 75 U.S.App.D.C. 334, 127 F.2d 18, "Where by reason of a conflict in the testimony, there is uncertainty as to the existence of negligence the question is for the jury."

If fair-minded men may honestly draw different conclusions as to the existence or nonexistence of the negligence charged, the question is not one of "law" for the Court but of "fact" for the Jury.

The Court further pointed out in *McWilliams v. Shephard* that:

> "Ordinarily, judgment notwithstanding the verdict ought not to be granted except where the evidence is so one-sided as to leave no room for doubt, and where the evidence is conflicting it is not error to deny the motion."

The Court said in *Christie v. Callahan*, 75 U.S. App. D.C. 133, 124 F.2d 825, what might be slight evidence when there is no such advantage, as in ordinary cases, takes on greater weight in malpractice suits because the physician has the advantage of knowledge and of proof.

In the case at bar, appellant had to depend upon the testimony of appellee against whom she sought to recover. As in *Christie v. Callahan*, appellant's case at bar was strengthened by appellee's evidence and admission in its testimony and hospital records that the explosion was caused by the careless use of a match in or near an oxygen tent in which the decedent, Joseph S. Stansbury, was placed due to a cardiac failure and pneumonitis. The jury found that appellee knew or in the exer-

cise of reasonable care should have known that this heart patient who had been given sleeping pills and digitalis by Nurse Kim was unable to take care of himself. The jury apparently also found as a fact that he "blacked out" shortly after being admitted in the emergency room and was therefore totally disabled and unaware of his surroundings according to his depositions. The jury further found that there was an omission of a positive duty by appellee in failing to take the necessary precautions in the use of a potentially dangerous instrumentality when not properly used, to wit, an oxygen tent.

Edwards v. Mazor Masterpieces, Inc., 111 U.S. App. D.C. 202, 295 F.2d 547 held:

> "Civil cases need not be proved beyond a reasonable doubt, but a fair preponderance of the evidence is all that is required. One who supplies a chattel for another to use is liable for bodily harm caused by the intended use if he knows or should know that the chattel is likely to be dangerous for the use for which it is supplied, has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition and fails to exercise reasonable care to inform them of its dangerous condition or of facts which make it likely to be dangerous."

The Court has long stood for the proposition that a verdict supporte by sufficient evidence or substantially supported by the evidence will no be disturbed on appeal. *McCauley v. United States*, 25 U.S. App. D.C. 404. Where a factual question is submitted to a jury under proper instructions with respect to which there is neither objection nor exception, the jury's verdict closes the question. *McDonald v. Schenkel*, 74 App. D.C. 346, 125 F.2d 737.

Goodwin, et al. v. Hertzberg, 21 U.S. App. D.C. 385, 201 F.2d 204, held:

Rule applicable in District of Columbia on motion for directed verdict in action founded on negligence, is that evidence must be construed most favorably to plaintiff, and to that end plaintiff is entitled to full effect of every legitimate inference therefrom, and if, on evidence, so considered, reasonable men might differ, case should go to jury.

Generally, direct and positive testimony of specific acts of negligence is not required in a malpractice action. In a malpractice action, facts alone may prove negligence, and if so, it is unnecessary to have expert witnesses.

The Court held in *Garfield Memorial Hospital v. Marshall, et al.*, 92 U.S. App. D.C. 234, 204 F.2d 721.

In general it is the duty of private hospitals to give a patient such reasonable care and attention as a patient's know condition requires, and this duty is measured by degree of care, skill and diligence customarily exercised by hospitals generally in the community and by express or implied contract with patient.

In action for injury sustained by baby as alleged result of hospital's negligent failure to provide proper care and attention during baby's mother's labor and delivery, evidence sustained finding that hospital had been neliggent and that such negligence had caused the injury which produced child's spastic condition.

Where there is evidentiary basis for jury's verdict, jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that Court might draw a contrary inference or feel that another conclusion might be more reasonable.

CONCLUSION

In conclusion, appellant respectfully requests this Honorable Court to reverse the Judgment for appellee notwithstanding the verdict in the Court below and reinstate the Jury's verdict and judgment for appellant.

Respectfully submitted,

A. Lillian C. Kennedy
Mabel D. Haden

506-A Fifth Street, N. W.
Washington, D. C.

Attorneys for Appellant

TABLE OF CONTENTS

[Filed August 8, 1963]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

JOSEPH S. STANSBURY
6228 Akron Street, S.E.
Washington, D.C.

Plaintiff

vs. Civil Action No. 2015-63

CASUALTY HOSPITAL, a Corporation
708 Massachusetts Ave., N.E.
Washington, D.C.

Defendant

COMPLAINT FOR PERSONAL INJURIES

The plaintiff, Joseph S. Stansbury, brings this cause of action for personal injuries and as reasons therefor states the following:

1. Jurisdiction of this cause is based on the fact that this is a civil suit involving over Ten Thousand Dollars ($10,000.00) exclusive of costs and interest. Plaintiff is an adult citizen of the United States and a resident of the District of Columbia; that the defendant is a corporation doing business in the District of Columbia.

2. That on or about December 7, 1962, the plaintiff was admitted by the defendant hospital as a heart patient and at the time of such admittance he was in an unconscious condition having suffered a severe heart seizure; that immediately thereupon, the defendant hospital acting through its agents and/or servants placed the plaintiff in an oxygen tent and soon after the oxygen tent caught fire igniting the plaintiff's hospital gown, causing him to become severely burned about the face, neck, chest and both arms.

3. That plaintiff as a result of the negligence of the defendant hospital has suffered serious and permanent injuries and continues to suffer serious and permanent injuries and continues to suffer severe pains throughout his body at the time of the filing of this suit.

4. That the negligence complained of by the plaintiff stems either from the fact that the oxygen machine was apparently in a defective condition at the time the plaintiff was placed in the oxygen tent and that the defendant acting through it's agents or servants knew or should have known of such defects; or that the defendant, it's agents and/or servants were grossly negligent in allowing a lighted cigarette in or near the oxygen tent; that the defendant knew or should have known the oxygen tank to be a dangerous instrumentality when negligently used.

5. That the plaintiff also relies on the doctrine of res ipsa loquitur.

6. That plaintiff is presently hospitalized and has undergone recent surgery as a result of the aforementioned accident.

WHEREFORE, the plaintiff demands Judgment against the defendant in the sum of Three Hundred Thousand Dollars ($300,000.00).

The Plaintiff Demands a JURY TRIAL on all the issues herein involved.

A. LILLIAN C. KENNEDY,
Attorney for Plaintiff

[Filed: August 29, 1963]

ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted against the defendant.

Second Defense

The Defendant admits that on or about December 8, 1962, the plaintiff while a patient in defendant's hospital received burns when he attempted to smoke while in a room with an oxygen tent. Defendant denies that there was any negligence on its part or any defect in the condition of its equipment which caused the fire. Defendant has no knowledge nor

information sufficient to form a belief as to the truth of the allegations contained in the complaint.

Third Defense

The injuries and damages sustained by the plaintiff were caused or contributed to by his own negligence and lack of due care for his own safety.

HOGAN & HARTSON

Frank F. Roberson
Attorneys for Defendant

[Certificate of Service]

PRETRIAL PROCEEDINGS

[Filed January 27, 1966]

STATEMENT OF NATURE OF CASE: Action for damages for personal injuries due to negligence (malpractice). [Action under the Survival Statute.]

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO: One Juseph S. Stansbury died intestate Feb. 28, 1965; P is the duly appointed and qualified administratrix of his estates. On or about Dec. 7, 1962, the decedent was admitted as a heart patient to D hospital and while a patient in D's hospital was burned while in an oxygen tent.

PLAINTIFF CLAIMS that the burns sustained in the hospital were on the face, neck, chest and both arms of decedent; that 7 or 8 skin graft operations during subsequent hospitalizations were required as a result of the burns; that the burns received while a patient at D hospital were either the proximate cause of decedent's death or that the burns

contributed to or hastened the death of P's decedent. P claims that the injuries and death were due to the negligence, gross negligence or failure on the part of D to exercise the degree of care required of it or commensurate with, the known inability of the patient to take care of himself while in an oxygen tent in allowing him to smoke or allowing others in the room with him to smoke, thus failing to take the precaution of not allowing anybody to smoke in the vicinity of an oxygen tent which was or should have been known to D to be a dangerous instrumentaility.

P relies on the doctrine of res ipsa loquitor.

PLAINTIFF'S SPECIAL DAMAGES:

$11.00 per wk provided to patient for groceries and cigarettes for 48 wks	$ 528.00
second-hand TV for use of patient	50.00
incidental expenses	140.00
Funeral	700.25
Bond for administratrix	10.00
Court Costs to date	9.86
Hospital bill (approx at $45/day)	16,000.00
TOTAL	$17,438.96

P's decedent was self-employed prior to the accident, and it is claimed he earned approx $5,000/year as a painter.

VERDICT AND JUDGMENT

[Filed September 19, 1966]

This cause having come on for hearing on the 15th day of September, 1966, before the Court and a jury of good and lawful persons of this district, to wit:

Garland E. Jones	Mrs. Myrtle C. Gorham
William P. Burke	Unit F. Crossley
Alvertus Lowery	Claude R. Henderson
Mrs. Peggy C. Waters	Mrs. Evelyn L. Shears
Thomas A. Davis	William D. Wheaton
Mrs. Elizabeth M. Hamilton	Mrs. Jean K. Belden

who, after having been duly sworn to well and truly try the issues between Mary G. Stansbury, Administratrix of the Estate of Joseph S. Stansbury, plaintiff and Casualty Hospital, a corporation, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 19th day of September , 1966, that they find the issues aforesaid in favor of the plaintiff and that the money payable to her by the defendant by reason of the premises is the sum of $9,120.50, hospital and doctors' bills, plus $8,000.00 damages or a total sum of $17,120.50.

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of nine-thousand-one-hundred-twenty-dollars and fifty cents ($9,120.50), hospital and doctors' bills, plus eight-thousand-dollars ($8,000.00), damages or a total sum of $17,120.50, together with costs.

ROBERT M. STEARNS
Clerk

JEAN F. MILLER
Deputy Clerk

Judge RICHMOND B. KEECH
Presiding.

[Filed: September 28, 1966]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR NEW TRIAL

Comes now the defendant by and through its attorneys and moves this Court for judgment in its favor as a matter of law notwithstanding the verdict, or, in the alternative, for a new trial because the verdict was against the overwhelming weight of the evidence and because of prejudicial errors committed during the course of the trial all as appears more fully in the attached memorandum of points and authorities which is made a part hereof.

HOGAN & HARTSON

Jeremiah C. Collins
Attorneys for Defendant

[Certificate of Service]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR NEW TRIAL

Facts

In the early evening of December 8, 1962, Joseph S. Stansbury telephoned his son and asked that he be taken to the hospital because he was not feeling well. His son picked him up and took him to defendant's hospital. There Mr. Stansbury got out of the car and walked into the emergency room. His son did not accompany him. Approximately twenty minutes later Mr. Stansbury walked out of the hospital and up to his son's car where he told his son not to bother to wait because he was going to be admitted. Mr. Stansbury himself had no recollection of this.

Mr. Stansbury then returned to the hospital where he was given a room. He got into bed and an oxygen tent was placed over him. Some two or three hours later a fire occurred in or about his oxygen tent and he was severely burned.

Mr. Stansbury testified by way of deposition. He stated that a doctor examined him in the emergency room when he first went into the hospital and that: "After that I must have blacked out. I don't know anything else." (Deposition page 12) His next recollection occurred about five or six weeks later.

Nurse Emert called by the plaintiffs testified she saw Mr. Stansbury in the emergency room and that he was alert, orientated and coherent. Mr. Stewart who helped him disrobe and get into bed said that while the man was not feeling well that he talked and acted normally. Mr. Stansbury, he said, gave him no occasion to think that he did not understand what was said to him. Mr. Stewart was the one that put the oxygen tent on Mr. Stansbury's bed and he testified that he told Mr. Stansbury that there was to be no smoking and no lighting of matches because of the presence of oxygen. He asked Mr. Stansbury whether he had any cigarettes or matches and Mr. Stansbury said that he did not. 1/ There was a sign "No Smoking" right on the tent itself.

Nurse Kim testified that she visited Mr. Stansbury and also told him that there was to be no smoking by him or anyone. Thereafter she checked him from time to time; made him comfortable; and, gave him medication. He was alert and coherent and he gave her no indication that he did not understand and appreciate his surroundings.

The hospital record indicates that he was checked by Nurse Kim as late as 10:00 P.M. and she testified that nurse's aides also checked him from time to time. The fire occurred at 10:15 P.M.

When the fire occurred Nurse Kim was called and she put it out. She herself suffered burns doing so. She asked Mr. Stansbury what had happened and he reported that he had tried to light a cigarette and that with the lighting of the match the fire occurred. The witness Allen testified that he heard Mr. Stansbury say the same thing. The witness Hicklin

---

1/ Mr. Stansbury testified in his deposition that he was a Camel smoker and had been for 28 or 29 years. (Deposition page 9)

testified that he asked Mr. Stansbury what had happened and that Mr. Stansbury reported the same thing. Dr. Garcia who treated Mr. Stansbury testified that Mr. Stansbury told him also that the fire had occurred when he, Stansbury, had tried to sneak a cigarette. And the hospital record indicates that two other treating or consulting physicians were told the same thing by Mr. Stansbury.

Argument

I

Plaintiff's contention succinctly stated was that Mr. Stansbury was in such a debilitated state mentally that it was the duty of the hospital to protect him against himself. Their theory is pitched solely upon Mr. Stansbury's remark that he must have blacked out and that he did not remember the incident. All of the evidence, however, was that Mr. Stansbury was acting normally. There was no evidence that defendant knew, should have known or could have known that Mr. Stansbury was in such a state mentally that he needed to be protected from himself. This evidence came not only from the nurse and orderly who saw and talked to him but also from his son who obviously did not think his father's condition such that he needed to accompany him into the hospital. He waited outside and then when his father came out and talked to him left. Presumably he knew his father better than anyone at the hospital and he did not testify that his father was in anyway mentally debilitated on the evening of his entrance into the hospital.

Moreover, there was no evidence that defendant breached any duty that was owing to Mr. Stansbury. Two people warned him about smoking and matches and there was a no smoking sign on the tent itself. The hospital was not under an absolute duty to prevent Mr. Stansbury from harming himself. Its duty was to exercise reasonable care and there was no evidence that it failed in this duty in any particular. Consequently, the jury's verdict could have only been predicated upon sympathy and speculation and should not be allowed to stand.

As was said in Pennsylvania Railroad Company v. Pomeroy, 99 U.S. App. D.C. 272, 239 F.2d 435 (1956):

> It is axiomatic that, to prevail in a negligence case, a plaintiff must prove sufficient facts, not only to warrant an inference of negligence, but also to justify an inference that such negligence was proximately related to the injury. . .

Here plaintiff has not proven sufficient facts to warrant an inference of negligence nor has plaintiff proven sufficient facts to warrant an inference that any assumed negligence was proximately related to the injury. The jury here like the jury in the Pomeroy case, supra, should not have been permitted to conjecture and speculate. Only by arbitrary guess not based on or warranted by any evidence could a jury conclude that defendant was liable to plaintiff. Brown v. Capital Transit Co., 75 U.S. App. D.C. 337, 127 F.2d 329 (1942), cert. denied, 317 U.S. 632 (1942); Taylor v. Crane Rental Company, 103 U.S. App. D.C. 13, 254 F.2d 350 (1958). For the defendant to be responsible in this case it would require a finding that defendant had an absolute duty to prevent Mr. Stansbury from injuring himself. Mr. Stansbury concluded he must have blacked out because he did not remember the incident. All the evidence from both sides of the case established that he acted mentally normal to all concerned. No reasonable man could conclude: (1) that he was mentally incompetent and, (2) that this should have been detected by someone. Nor could any reasonable man conclude that this or any hospital had an absolute duty to prevent this man from injuring himself. This defendant had a right to assume that Mr. Stansbury would pay heed to the advice given him and the facts of the situation unless or until there was some evidence, some indication upon which a reasonable man should conclude otherwise.

II

A. For the reasons stated in I, supra, the jury's verdict was against the overwhelming weight of the evidence and could only have been bottomed

upon some improper motive. Defendant is entitled at the very least to a new trial.

B. The court committed prejudicial error in permitting the witness Mims to testify. The pretrial order required that the parties exchange the names and addresses of witnesses by February 19, 1966. The case was set for trial on September 7, 1966 and the parties were on telephone alert from that day until the trial actually began on September 15, 1966. On September 14, 1966 defendant's counsel received a list of witnesses from plaintiff's attorneys. The witness Mims was not on that list. Defendant's first awareness of Miss Mims was when she was called to testify at the trial. At first the court sustained the objection of defendant's counsel to her testimony and then reversed itself and permitted the witness to testify. When allowed to testify the witness purported to be knowledgeable of the duties and practices of hospitals in this community and testified as to what she thought they were with respect to patients in oxygen tents. It was prejudicial error to have permitted the witness to testify.

C. The court committed prejudicial error in receiving evidence on and permitting the jury to consider as an element of damages the reasonable value of medical and hospital services provided to plaintiff by defendant. Adams v. Turner, 238 F.Supp. 643 (1965). 2/

Respectfully submitted,
HOGAN & HARTSON

Jeremiah C. Collins
Attorneys for Defendant

2/ The case mentioned by defense counsel at trial in which Judge McLaughlin was the trial judge was Adler v. Cohen. It was unreported and took place sometime before the cited case.

[Filed Oct. 3, 1966]

OPPOSITION TO DEFENDANT'S "MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL"

The plaintiff by and through counsel opposes defendant's Motion for Judgment Notwithstanding the Verdict or for a New Trial and as reasons therefor states:

1. That a Motion for Judgment Notwithstanding the Verdict raises only questions of law.

2. That defendant's memorandum does not state sufficient reasons for the granting of a new trial.

3. And for such other and further reasons as set forth in plaintiff's attached Memorandum of Points and Authorities and which will be brought to the attention of this Honorable Court at the time of the hearing of this Motion.

A. LILLIAN C. KENNEDY
MABEL D. HADEN
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL

In defendant's Memorandum of Points and Authorities there is a gross misstatement of the evidence which was purported to be adduced in Court at the time of trial. This seems, however, to be irrelevant since the determination of the facts were solely within the province of the jury. The Court exercised its wise and judicial discretion which was in keeping with our United States Court of Appeals decisions, in submitting the case to the jury for its determination on the issue of negligence.

In Koninklyke Luchtvaart Maatschappy N.N. KLM Royal Dutch Airlines Holland, et al v. Gertrude Owen Tuller et al, 110 U.S. Appeals D.C., 282, 292 F.2d 775, the Court said:

"On Motion for directed verdict evidence must be construed most favorably to plaintiff, and to such end he is entitled to full effect of every legitimate inference therefrom."

"On Motion for directed verdict, case should go to jury, if, on evidence, construed most favorably to plaintiff, reasonable men might differ, but motion should be granted if no reasonable man could reach verdict for plaintiff." (Ibid)

In the case at bar twelve (12) reasonable men reached a verdict for the plaintiff without any apparent difficulty.

The defendant cites Pennsylvania Railroad Co. v. Pomeroy, 99 U.S App. D.C. 273, and other cases which are not applicable to the case at bar. In the Pomeroy case, the passenger fell through an open vestibule door to his death. There the cause of the accident was not known, hence there was apparently some room for speculation as to why he fell, etc.

In Brown v. Capitol Transit Co., 75 U.S. App. D.C. 337 there again where a passenger claimed she was injured when she alighted from a street car, but she didn't know how it happened. This case is inapplicable to the case at bar. But in the case at bar, there is no question about the cause of the accident. It was stipulated and admitted by the defendant that the proximate cause of Mr. Stansbury's injuries was the explosion of the oxygen tent. It was agreed that the cause was the careless use of a lighted match by someone in a room where there was an oxygen tent being operated. The plaintiff maintained that there was an omission of a duty on the part of the defendant and its servants and/or employees to take the necessary precaution of not allowing anybody to smoke in the vicinity of an oxygen tent which was or should have been known to the defendant to be a potentially dangerous instrumentality. The plaintiff further alleged and proved to the satisfaction of

the jury that the defendant failed to exercise the degree of care required of it or commensurate with the known inability of the patient to take care of himself while in an oxygen tent, suffering from coronary condition and pneumonities, and having been given digitalis and sleeping pills.

The U.S. Court of Appeals said in McWilliams v. Shephard et al, 75 U.S. Appeals, D.C. 334, 127 F.2d. 18, "Where by reason of a conflict in the testimony, there is uncertainty as to the existence of negligence, the question is for the jury."

"On Motion for a directed verdict if fair-minded men may honestly draw different conclusions as to the existence or nonexistence of the negligence charged, the question is not one of "law" for the court but of "fact" for the jury." (Supra)

"Ordinarily, judgment notwithstanding the verdict ought not to be granted except where the evidence is so one-sided as to leave no room for doubt, and where the evidence is conflicting it is not error to deny the motion. (Supra)

The defendant complains that there was error for one, Mrs. Mims to testify since her name was not previously listed as a witness by the plaintiff. This was within the trial courts judicial discretion and was quite proper. The defendant cannot claim prejudice since Mrs. Mims testimony was cumulative and in keeping with testimony of defendants witnesses relative to the care and precautions which should be taken in the use of oxygen tents. This was testified to by Miss Kim, Mr. Stewart, Dr. Garcia and by Mrs. Emert, also listed as one of defendants' witnesses. Therefore it was not error to permit Mrs. Mims to testify. If, any, however, it became harmless when she testified only as to the necessary precautions to be taken in use of oxygen tents.

Speaking of noncompliance with pre-trial order, defendant failed to comply with documents which were supposed to be presented to plaintiff and was even permitted to change his theory of contributory negligence as alleged in the defendants' pleadings.

Defendant stated at the time of trial that he was not relying on contributory negligence, but that he would prove that the proximate cause of the explosion was decedents' negligence. This he did not do.

As in Christie v. Callahan, 75 U.S. Appeals, D.C. 133, 124 F.2d 825, the defendants construed their case so that if their theory of proximate cause failed, which it did in the eyes of the jury, the plaintiffs were predestined to prevail. The plaintiff's case, as in Christie v. Callahan (supra) was strengthened by defendant's evidence and admission in its testimony and hospital records that the explosion was caused by the careless use of a match in or near an oxygen tent in which the decedent, Mr. Stansbury, was placed due to a cardiac failure and pneumonitis.

The plaintiff and defendant agree as to what brought about the accident. The disagreement and hence the issues were: Who struck the match? Why were persons permitted to have matches and cigarettes in a room with an oxygen tent? Who was in charge of the oxygen tent? Did Mr. Stansbury receive reasonable care and care commensurate with his inability to take care of himself? Were necessary precautions taken by defendant in the use of such a potentially dangerous instrumentality as an oxygen tent? Was there an omission of a duty on the part of the defendant? These issues were properly submitted to the jury.

Edwards v. Mazor Masterpieces, Inc., 111 U.S. App. D.C. 202, 295 F.2d 547, held:

"One who supplies a chattel for another to use is liable for bodily harm caused by the intended use if he knows or should know that the chattel is likely to be dangerous for the use for which it is supplied, has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and fails to exercise reasonable care to inform them of its dangerous condition or of facts which make it likely to be dangerous."

"Civil cases need not be proved beyond a reasonable doubt, but a fair preponderance of the evidence is all that is required." (Supra)

In the case at bar, the pleadings, the deposition of Mr. Stansbury, relative "to blacking out" shortly after being admitted, the causation of explosion, matters apparent in the hospital record, all constituted genuine issues of material facts which were properly submitted to the jury by all of the weight of authority in this jurisdiction.

Finally, defendant claims that the court committed prejudicial error in receiving evidence of reasonable value of medical and hospital services provided to plaintiff. There is no authority which supports defendant's contention. The United States Court of Appeals for the District of Columbia has clearly defined items of damages in survival actions in Hudson v. Lazarus, 95 U.S. Appeals, D.C. 16, 217 F.2d. 344. This case has not been overruled.

"Generally, the law seeks to award compensation, and no more, for personal injuries negligently inflicted, but injured person may usually recover in full from a wrongdoer regardless of anything he may get from a 'collateral source' unconnected with the wrongdoer."

"In personal injury action, value of all reasonably necessary medical and hospital services furnished plaintiff's decedent without charge by naval hospital because he was veteran should have been included in determining amount of damages."

"Disabilities sustained by one in automobile collision were not "pain and suffering", within exception in survival act precluding recovery for pain and suffering of decedent prior to his death. D.C. Code 1951, § 12-101."

"Were plaintiff in personal injury action died while action was pending and action was revived in name of plaintiff's administratrix, decedent's probably future earnings during his life expectancy, discounted to present worth, should have been included in determining amount of damages for permanent injuries. D.C. Code 1951, §§ 12-101, 16-1201, 16-1203."

In the case at bar, plaintiff subpoenaed the hospital's financial records. One, Miss Kelleher, testified that Mr. Stansbury's hospital bill

totalled $7,420.50. Dr. Braden testified that the reasonable value of his services was $700.00. Dr. J. Rodgers Young testified that the value of his services was $1,000.00. This made a total of $9,120.50. The jury only allowed an additional $8,000.00 for the decedent's serious and permanent disabilities.

In conclusion, plaintiff respectfully requests for the above reasons and any others which, this Honorable Court may deem just and meet, that defendant's Motion be denied.

A. LILLIAN C. KENNEDY
MABEL D. HADEN
Attorneys for Plaintiff

[Certificate of Service dated October 1966]

[Filed Oct. 21, 1966]

MEMORANDUM

This matter is now before the court on a motion for judgment n.o.v. or in the alternative for a new trial, following a verdict for the plaintiff. The court is constrained to grant the motion for judgment n.o.v. There is no evidence which could justify a finding of negligence or a finding that any assumed negligence proximately caused the fire and resulting injuries. Thus, the verdict of the jury had to be based on pure conjecture or speculation, or possibly sympathy. Indeed, both at the conclusion of the plaintiff's case and at the close of the entire case, when the court denied defendant's motion for a directed verdict, it indicated grave doubt as to the propriety of permitting the case to go to the jury. However, in conformity with what has been declared by our Court of Appeals to be the better practice and in the interest of economy of time and expense, the case was submitted to the jury.

In essence, the plaintiff's position is that his condition was such as to require that the defendant not only warn the plaintiff as to no smoking

but take whatever steps might be necessary to absolutely prevent any attempt by him or anyone else to smoke in the room. All of the evidence shows without challenge that the plaintiff's act caused the fire. There is no evidence that anyone else in the room or anyone who may have come into the room was smoking or attempting to do so.

The record is unchallenged that the plaintiff was timely warned and that he comprehended such warning. Plaintiff's counsel attempts to show that he suffered a blackout prior to the fire. This theory was first presented when plaintiff's deposition was taken in January, 1964 (months after the occurrence on December 7, 1962), when the plaintiff is recorded as having testified that he must have blacked out, as he couldn't remember anything from the time he was examined in the emergency room to a point five or six weeks later. The record is replete with evidence that the plaintiff spoke and acted rationally at all pertinent times. Even assuming the conclusion of the plaintiff to be accurate, the record is also replete with evidence to the effect that up to the time of the fire the defendant was without any information by way of word or action which did or could have put defendant on notice as to any absence of mental capacity of the plaintiff from any cause. All of the evidence was to the contrary. The record discloses that the plaintiff was checked upon at intervals and that he was last checked as being "OK" fifteen minutes prior to the fire.

The doctrine of res ipsa loquitur was held not to be applicable under the facts of this case.

The defendant has contended that the court erred in permitting the witness Mims, a nurse, to testify over objection of the defendant, inasmuch as the witness had not been listed as required by pretrial order. It is true that the witness was not listed and that defendant's counsel was not advised until trial. The court, in the exercise of its discretion, permitted her to testify on condition that if defendant's counsel needed time to investigate in the light of her testimony he would be accorded such opportunity. No such request was made by defendant's

counsel. The action of the court heretofore taken is based on the entire record, including the testimony of the witness Mims.

In conformity with the foregoing, the court has indicated on the face of the said motion that judgment n.o.v. is granted.

R. B. KEECH
Judge

October 17, 1966

ORDER

This cause came on to be heard at this term upon motion of defendant for judgment in its favor notwithstanding the verdict and upon consideration thereof it is by the Court this _____ day of _____, 1966

ORDERED that the verdict and judgment entered in this matter in favor of the plaintiff on September 19, 1966 be and the same is hereby vacated and it is further

ORDERED that defendant's motion for judgment in its favor notwithstanding the verdict be and the same is hereby granted and judgment is hereby entered in favor of defendant.

Judge

[Certificate of Service dated 19 October 1966]

NOTICE OF APPEAL

Notice is hereby given this _____ day of November , 1966, that the plaintiff, Mary G. Stansbury, Administratrix of the estate of Joseph S. Stansbury, deceased hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment n.o.v. of this Court entered on the 21st day of October , 1966 in favor of the defendant, Casualty Hospital, a corporation against said plaintiff.

A. LILLIAN C. KENNEDY
MABEL D. HADEN
Attorneys for plaintiff

[Certificate of Service dated 18 November 1966]

EXCERPTS FROM TRIAL PROCEEDINGS

[1] Washington, D. C.
September 15, 1966

* * *

[3] THE COURT: I assumed there was a stipulation between counsel as to the fact that this lady is the duly appointed administratrix of the estate and that she is serving in that capacity?

MISS KENNEDY: Yes.

THE COURT: I only mention that to you so you may go from there without attempting to prove it.

MISS KENNEDY: Thank you, Your Honor.

THE COURT: Are there any other stipulations?

MISS KENNEDY: Yes.

THE COURT: What is the stipulation?

MISS KENNEDY: That there was a fire in the oxygen tent.

MR. COLLINS: In or --

MISS KENNEDY: About the tent or in or around the tent.

MR. COLLINS: We admit there was a fire.

[4] MISS KENNEDY: Therefore, in order to save time, we may or may not call the fire marshall.

Of course, there is an admission that he was burned, right?

MR. COLLINS: Yes.

THE COURT: All right. You may treat those matters as stipulations on the record.

(End of Bench Conference.)

THE COURT: Your first witness.

MISS KENNEDY: May it please the Court, Ladies and Gentlemen of the Jury, I will now --

THE COURT: You are going to read a deposition?

MISS KENNEDY: Yes.

THE COURT: All right. Tell us what you are reading from.

MISS KENNEDY: Very well. This is the deposition of Joseph S. Stansbury who was called by the defendant, Casualty Hospital, during his life time. It was taken in the offices of Hogan and Hartson, 800 Colorado Building, Washington, D. C.

Those who were present at the time were counsel for the plaintiff, Lillian Kennedy, and counsel for the defendant.

We would like to read from page two of the deposition.

* * *

[8] MISS KENNEDY: I will read the deposition.

"JOSEPH S. STANSBURY

* * *

"EXAMINATION BY COUNSEL ON BEHALF OF THE DEFENDANT

BY MR. COLLINS:

* * *

[16] "Q. On December 7, 1962, did you go to Casualty Hospital? "A. Yes.

"Q. Why did you go to Casualty Hospital? "A. This heart condition.

"Q. How did you go to Casualty Hospital? "A. My son carried me. I called my son and I told him, I said, "Tommy, you had better get here mighty fast because I can't breathe and I've got this terrible pain around my heart."

* * *

[19] "Q. On December 7, 1962, did your son come and get you? "A. That's right, sir.

[20] "Q. Did he drive you over to the hospital? "A. That's right.

"Q. Drove you over to Casualty Hospital? "A. Yes, sir.

"Q. What time of day was this? "A. It was sometime in the evening.

"Q. Was it before ten o'clock at night? "A. Oh, yes.

"Q. And then when you got to Casualty Hospital, did your son take you in? "A. He walked to the door with me.

"Q. Walked to the door? "A. That's right and opened the door and I walked in.

"Q. Did he come in or not? "A. I don't think so. I am not sure.

"Q. And when you went in the door at Casualty Hospital, where did you go then? "A. Well, the lady at the desk right inside as I walked in, she called this doctor and he examined me. After that I must have blacked out. I don't know anything else.

"Q. You don't remember anything else? "A. I don't remember nothing else.

* * *

[23] MISS KENNEDY: Reading from page 12 of the deposition.

"Q. Did he drive you over to the hospital? "A. That's right.

"Q. Drove you over to Casualty Hospital? "A. Yes, sir.

"Q. What time of day was this? "A. It was sometime in the evening.

"Q. Was it before ten o'clock at night? "A. Oh, yes.

"Q. And then when you got to Casualty Hospital, did your son take you in? "A. He walked to the door with me.

"Q. Walked to the door? "A. That's right and opened the door and I walked in.

"Q. Did he come in or not? "A. I don't think so. I am not sure.

"Q. And when you went in the door at Casualty Hospital, where did you go then? "A. Well, the lady at the desk right inside as I walked in, she called this doctor and he examined me. After that I must have blacked out. I don't know anything else.

"Q. You don't remember anything else? "A. I don't remember anything else.

[24] "Q. And this is after the doctor examined you? "A. That's right.

"Q. What is the next thing you remember? "A. I guess about five or six weeks afterwards and then I realized that I was burned.

"Q. Do you remember getting burned? "A. No.

"Q. Do you remember being burned? "A. No.

"Q. Do you remember whether you ever smoked in bed? "A. No.

"Q. Did you take cigarettes with you when you went to the hospital? "A. I don't think so.

"Q. You say you smoke Camels; is that right? "A. That's right. I've got some right here.

"Q. You have some Camel cigarettes right here that you are showing me. "A. Yes, and they have lasted me three days.

"Q. Do you recall, do you yourself recall whether you were placed in an oxygen tent? "A. No, I cannot, sir.

[25] "Q. Do you remember whether you smoked while you were in the hospital? "A. No, sir, I do not.

"Q. So you don't know whether you were smoking? "A. No, I couldn't say. I don't think I was. I couldn't say that I was.

"Q. Pardon me? "A. I say, I can't say that I wasn't.

"Q. Can't you say that you -- "A. Smoking. Just like I said, sir, six or eight weeks after I had been there, I realized I was burned.

"Q. When you say six or eight weeks afterwards, were you in the hospital then? "A. Yes.

"Q. And what was your first awareness -- in other words, you don't remember five or six weeks of your life? "A. That's right.

"Q. Do you remember any of your nurses there at the hospital? "A. Well, there was one of the nurses there, one of the aides told me they got me out of this oxygen tent, I was in there burning. So one of the nurses burned herself getting me out.

[26] "Q. Do you know what that nurse's name was that got burned? "A. No, I don't.

"Q. Did you ever talk to the nurse that got burned? "A. I did just before she was transferred from the hospital.

"Q. What did she say to you? "A. She showed me her hands where they were burned.

"Q. Did she say she had been the one that had put the fire out? "A. She didn't say that she put the fire out or nothing but she helped to put it out with a blanket, I think she said.

"Q. Did you ever ask her how the fire started? "A. I did and she said she didn't know.

"Q. She did? "A. That's right.

"Q. Did you ask anybody else how the fire started? "A. Yes.

"Q. What did they say? "A. They said the same thing, they didn't know.

"Q. Where you had the fire, was there someone else in this room? "A. I believe there was.

[27] "Q. Do you know who that was? "A. No, I don't.

"Q. Did you ever talk to that person? "A. No.

"Q. Do you ever remember being in an oxygen machine? "A. No, sir.

"Q. Or in an oxygen tent? "A. No, sir.

"Q. In your complaint which started this lawsuit that was filed for you by your attorney, it says that the oxygen machine was apparently in a defective condition at the time the plaintiff -- and you are the plaintiff -- was placed in the oxygen tent.

In view of that, I would like to ask you whether you know what was defective about the oxygen machine oxygen tent? "A. I don't know, sir. I couldn't answer that. I don't know.

"Q. Do you know of anyone that does? "A. No, I do not.

"Q. Also in the complaint it says that the hospital was grossly negligent in allowing a lighted cigarette in or near the oxygen tent.

[28] "Do you know who was smoking a lighted cigarette? "A. No.

"Q. Do you know whether it was in the oxygen tent? "A. That I don't know.

"Q. You don't know whether a cigarette was even smoked there? "A. No, I don't.

"Q. The only thing as I understand that you recall is that five or six weeks after you went to the hospital, you became aware of the fact that you had been burned? "A. Burned; yes.

"Q. You don't know how it happened, I understand? "A. No, I don't.

"Q. You don't know when it happened, I take it? "A. No, sir, I don't.

The last thing I remember, just like I said, is when this doctor looked me over and then admitted me in the hospital.

"Q. When the doctor looked you over, were you in a room then or had you been assigned to a room? "A. No, I was right there.

"Q. You had just come into the hospital? "A. Just come into the hospital.

[29] "Q. Were you still dressed in your street clothes? "A. That's right.

"Q. And that is the last thing you remember for five or six weeks? "A. That's right.

"Q. You don't know what caused any of your burns? "A. Well, they would have to be oxygen tent.

"Q. Why do you say that? "A. Well, I couldn't have been burnt no other way.

"Q. You don't even know whether you were in an oxygen tent; do you? "A. Well, this nurse, the nurse's aid said the tent was on fire.

"Q. Was it more than one person that told you the tent was on fire? "A. Quite a few of them heard the noise and the rumpus. I could hear somebody saying that the tent was on fire and a man was burned up in it, and that was me.

"Q. Where did you hear that? "A. Just talking around the hospital wards.

"Q. This was five or six weeks afterwards? "A. Yes.

[30] "Q. What did you hear the people say about this fire, about the oxygen tent and the man in it? "A. It was in the ward."

Now, I am going down to the third question.

"Q. Who did you hear say that? "A. Just like I said, people on the ward.

"Q. When did you hear this? "A. Like I say, about five or six weeks after when I learned that I was burned.

"Q. What part of your body was burned? "A. Over three-thirds of it.

"Q. Over three-thirds of it? "A. Yes. Third degree burns.

"Q. Third degree burns? "A. (Nodding head.)

"Q. Where were your burned? "A. The arm.

"Q. The left arm. "A. Chest.

"Q. The chest. "A. Back.

"Q. Back? "A. Yes, and this one over here was burned.

[31] "Q. Your right arm? "A. (Nodding head.)

"Q. All right. Have you had skin grafts because of that? "A. Seven or eight of them. This was the last one I just had.

"Q. On your neck? "A. (Nodding head.)

"Q. Will you have any more skin grafts in the future? "A. I imagine there will be in this arm and they may have to come around my neck again. I don't know.

"Q. Was your face burned at all? "A. Yes.

"Q. Where was it burned? "A. All along the side, both sides.

"Q. Who has been your doctor since you were burned? "A. Well, Dr. E. Garcia taken over.

"Q. And what hospitals have you been in? "A. Just Casualty.

"Q. Just Casualty? "A. (Nodding head.)

"Q. Have you ever told anybody that you remembered how this accident happened? [32] "A. No.

"Q. Have you tried to remember how this accident happened? "A. Time and time.

"Q. And you have never been able to remember? "A. No. But I can say one thing.

"Q. What is that? "A. There wasn't a mark on my body when I went in there, not one. My body was in perfect shape.

"Q. When you went into the hospital were you having difficulty breathing? "A. That's right. Congestion. That is how I happened to call my son to come and get me right away.

"Q. Do you take a drink of alcohol from time to time? "A. Once in a while.

"Q. When you walked into the hospital on this evening, had you had anything, any alcoholic drink that evening? "A. No.

"Q. How about that day? "A. No.

"Q. Whenever you had a heart pain, did you ever take a drink of alcohol to make you feel any better? "A. Once in a while I'd take a drink and put hot water [33] and sugar. That kind of --

"Q. Would that help a little bit? "A. That would ease it off a lot.

"Q. Did you try that that evening before you went to the hospital? "A. Huh?

"Q. Did you take a drink of alcohol with sugar in it that evening? "A. No.

"Q. Are you sure? "A. I am perfectly sure.

"Q. When you went into the hospital, do you recall whether you were given a shot of any sort? "A. No, only the doctor was just checking me over.

"Q. He just checked you over? "A. Yes.

"Q. And then what? "A. And I think he said if I remember right, 'Get this man up in the bed,'

"Q. That is all you recall? "A. And I guess everything blacked out.

"Q. Do you know how the oxygen tent got on fire? "A. No.

[34] "Q. Did anybody ever tell you? "A. No.

"Q. Did you know that smoking and oxygen didn't go together? "A. Sure because I weld with acetylene gas.

"Q. Pardon me? "A. I weld with that gas. I've done it a many a time.

"Q. With that kind of gas? "A. Oh, yes. I was fully aware it was a high explosive.

"Q. As I understand it, you don't recall anything about this accident? "A. No. The only thing, the last thing I can recall is when that doctor examined me.

"Q. That is when you first went into the hospital? "A. That is when I first went into the hospital.

"Q. And you still had your street clothes on? "A. That's right.

"Q. And you recall him saying put this man in bed right away? "A. Yes and that is the last thing I heard him say.

"Q. And then the next thing you recall is what? "A. I was burned.

* * *

[39] "EXAMINATION BY COUNSEL ON BEHALF OF PLAINTIFF

"BY MISS KENNEDY:

"Q. I want to clear up about this.

"Did you testify that after you stopped working for these various companies, that you were self-employed? "A. That's right.

"Q. Were you earning any money by your self-employment? "A. Not very much.

"Q. Approximately how much? "A. Oh, I'd say some days I would earn up to $18, $20, $25 a day.

"MISS KENNEDY: Now we have some pictures here that we will mark Plaintiff's Exhibits 1 and 2.

"(The photographs referred to above were marked Plaintiff's Exhibits 1 and 2 for identification.)

[40] "BY MISS KENNEDY:

"Q. I would like to ask you -- now I show you, Mr. Stansbury, a picture which we have marked Plaintiff's Exhibit No. 1.

Is that your picture? "A. That is.

"Q. And when did you have that made? "A. I believe that was in December, I think it was, '62 or '63. I don't know which.

"Q. Could that have been made in the fall of '63 about October? "A. Yes, it could.

"Q. All right.

"What does that show there? "A. It just shows that I was burned all through my arms, my neck and my face, chest, through this right arm here.

"Q. All right.

"Now approximately how many times have you been hospitalized for these burns? "A. Like I said, about six or seven times, maybe a little more. I just can't recall.

"Q. And I show you this one here with a full view. "A. Yes.

* * *

[41] "Q. What does that one show? "A. That shows where I was burned on the leg here on this -- under this right arm here, across my back and neck, face, up through the front of my face, across my forehead.

"Q. All right.

"Now what do those places on the leg indicate? "A. That's skin graft.

[42] "Q. You mean the skin was taken from that part of your body? "A. Yes, it was taken from there. That was to graft around my neck.

"Q. How has this accident affected you with respect to sight, hearing or speech? "A. Well, it has really dimmed my sight 100 per cent. I can't read any more. I can't even read a paper or a book or nothing.

"Q. And has it affected your speech any? "A. Somewhat. The operations haven't done it any good.

"Q. Have you been discharged yet from the hospital? "A. No.

When you say '"discharge'", you don't have to go back for treatments or anything like that?

"Q. Yes. "A. No. I have to go back in a week's time for a check-up.

"MISS KENNEDY: I have no further questions.

"FURTHER EXAMINATION BY COUNSEL ON BEHALF OF DEFENDANT

"BY MR. COLLINS:

"Q. How old are you, Mr. Stansbury? "A. 65.

"Q. Did you file Federal income tax returns up until 1962? "A. Oh, yes.

* * *

[44] MISS KENNEDY: We would like to call, ladies and gentlemen, as our next witness, Mr. Davis.

MR. COLLINS: May we approach the Bench?

THE COURT: Yes.

[45] (Bench conference.)

MR. COLLINS: Your Honor, I gather that plaintiff now wishes to put into evidence certain pictures. I would object to any pictures coming into evidence for this reason: This man indeed was burned, and the pictures, I think, will tend to inflame the jury, and moreover, since there is no claim for pain and suffering, I don't think the pictures would serve any useful purpose, and they would tend to inflame the jury.

THE COURT: Let me see them.

(The pictures were shown to the court.)

MISS KENNEDY: May I be heard on that, Your Honor?

THE COURT: Certainly.

MISS KENNEDY: Your Honor, as Your Honor knows, plaintiff can recover for disabilities, and I certainly think that these pictures would be admissible to show that and there is nothing about pain there in showing the burns and it would tend to prove the plaintiff's case for disability.

MR. COLLINS: Your Honor, he described his disability in some detail in his deposition.

THE COURT: I will deny them at this time. You will have witnesses, and you have already gotten in the fact there were third degree burns on the arm and neck and the back and on other parts of his body.

These pictures do seem inflammatory at this time. [46] If you want to come back again, we can consider them further.

MISS KENNEDY: Your Honor, the only thing I had in mind is this: Unfortunately the man is dead, and if he were here, it would certainly be permissible to show them to the jury, would it not, sir?

THE COURT: We don't have that question, Miss Kennedy. The question is whether or not they should be used, and I think the law is that where you have adequate evidence in, you are not to use pictures which would tend to inflame, and you have peculiarly that principle here under a survival action where there can be no pain and suffering.

MISS HADEN: How about disability?

THE COURT: We agree on that.

MISS KENNEDY: Your Honor, I have subpoenaed the man who took these pictures but all he can do is talk from his memory.

THE COURT: Mr. Collins, if it be determined that these pictures are admissible, you will make no objection because of the absence of the man who took them?

MR. COLLINS: No, Your Honor.

THE COURT: You may excuse him.

MISS KENNEDY: I will ask whether he took the pictures.

THE COURT: You need not ask him that at all.

* * *

[47] THOMAS STANSBURY

* * *

DIRECT EXAMINATION

BY MISS KENNEDY:

Q. Will you please state your name? A. Thomas Stansbury.

* * *

[48] Q. And what is your address, Mr. Stansbury? A. 6228 Akron Street, Southeast, it is actually in Maryland.

Q. Are you employed? A. Yes, I am.

Q. Where are you employed? A. RCA Communications.

Q. Are you married? A. Yes.

Q. Now, Mr. Stansbury, were you related to the decedent, one Joseph S. Stansbury? A. Yes, I am his son.

Q. And you are related to the plaintiff, an administratrix, Mary G. Stansbury? A. My mother.

Q. Speak up. A. That is my mother.

Q. Now, directing your attention to on or about December [49] 8, 1962, did you have the occasion to see your father, Mr. Stansbury? A. Yes, I got a telephone call asking me to meet him and with this I did. He lived in the 16-- 600 block of D Street, Southeast.

THE COURT: You drop your voice, sir. People are having difficulty.

THE WITNESS: The 600 block of D Street, Southeast, and he asked me to take him to the hospital, which I did, and I imagine it was about twenty minutes that we were there, and maybe one way or the other, and he came out and told me he was going to be admitted to the hospital and it was no sense of my staying, and I could see him in the morning.

BY MISS KENNEDY:

Q. Now, Mr. Stansbury, of your own personal knowledge, on December 8, 1962, when you stated you carried Mr. Stansbury to the hos-

pital, were there or were there not any scars on his body? A. No, he had no scars whatsoever. I am sorry, he had an appendectomy scar. That is all.

Q. Did there come a time when you subsequently returned to the hospital? A. Yes, I received another call.

[50] Q. Don't tell us what the call was, but as a result of this call what, if anything, did you do? A. As a result of the call, I returned to the hospital the next morning. This call asked me to come to the hospital. Can I tell them why? I mean, the reason I had to go to the hospital?

Q. What, if anything, did you observe when you reached the hospital? A. Well, this is the next morning then at approximately eight o'clock or so, and the nurse showed me to my father's room which was a different room than I was accustomed to, you know, and he had been admitted that night, and I didn't know what floor or anything else and so I asked the nurse and she told me he was formerly in one room and he was now in another room.

I went there and he was awake, but in my opinion not conscious because he didn't know I was there.

He was burned over his face, his neck, his chest and his side, and open wounds. These wounds were not covered. I could see them clearly. He was blistered and I mean big blisters and the flesh was laying open. This was -- I must say I could see about half of his body and this is what I observed.

[51] Q. All right. Now, approximately how often did you see Mr. Stansbury after this occurrence? A. Well, I went to the hospital every other day. At first I went every day, of course, and then tapered off to every other day as he improved, but from then on until the time he died I saw him on an average of two or three times a week.

Q. Now, of your own personal knowledge, how many times was Mr. Stansbury hospitalized during his life time as a result of these burns? A. Well, seven or eight, at least.

Q. And just prior -- do you know when your father passed? A. It was February 28, 1965.

Q. Well, now, when was the last time that you saw him just prior to February 28, 1965? A. That was on a Sunday. I saw him on Saturday, the same week, the day before.

Q. All right. Now, at that time, what was your father's physical appearance with reference to these injuries? A. Well with reference to the injuries, he still had many scars over his body. His neck never did heal properly. It had gathers of scar tissue in this area and when he turned his neck, he had to turn his whole body in order to turn around.

[52] I believe the one in his neck was even oozing still after all this time. This was a cluster, but I don't know how to explain it, but it was like a cluster of scar tissue.

Q. Of your own personal knowledge, what disabilities -- I think you told us some, but were there any other disabilities that you were able to observe just prior to the time that he passed? A. Well, when I saw him on this Saturday, he was complaining to me then of chest pains. He also said he was very tired and as a matter of fact, he was standing at that time and he sat on the bed to continue talking with me, and I asked him then do you want to go back to the hospital, or do you want to see a doctor, and he said, no, and so I said, I will check with you in the morning, and he said, all right.

This was approximately a ten or fifteen minute conversation, and then I left him, and the next -- I had to work the next day, and incidentally, I didn't get to see him in the morning and he died that evening.

MISS KENNEDY: Your witness.

MR. COLLINS: No questions, Your Honor.

* * *

[54] MARJORIE WILLOUGHBY

was called to the witness stand on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MISS KENNEDY:

Q. Now, is it Miss or Mrs.? A. Mrs. Willoughby.

Q. Will you please state your full name? A. Marjorie Willoughby.

Q. Are you employed? A. Yes, I am.

Q. For whom are you employed? A. Casualty Hospital.

Q. And what are your duties there at Casualty Hospital? A. I am Record Librarian.

Q. And did you receive a subpoena to come here today? A. Yes, ma'am.

Q. Were you asked to bring certain record with you? A. Yes, I was.

Q. And did you bring those records? A. Yes, I have.

Q. Were these records kept in the regular course of business?

[55] A. Yes.

* * *

[56] THE COURT: Number one constitutes the record kept in the regular course of business and that is received per stipulation without objection.

(Plaintiff's Exhibit No. 1 was received in evidence.)

THE COURT: Now, are the x-rays received in the same manner, Mr. Collins?

MR. COLLINS: Yes.

THE COURT: They are received, too.

(Plaintiff's Exhibit No. 2 was received in evidence.)

BY MISS KENNEDY:

Q. Now, Mrs. Willoughby, will you please look at your records

and tell us when Mr. Stansbury was admitted to the hospital? A. Admission date is 12-8-62.

Q. All right. Does the record show what, if any, treatment he was given on that date? A. On that particular date?

Q. Yes, ma'am. A. I will refer to the physician's order sheet. It is quite lengthy, everything that was ordered.

THE COURT: Are you interested in any particular part?

BY MISS KENNEDY:

[57] Q. Does your records show what, if anything, was done in the emergency room on December 8, 1962? A. Yes. These orders I was referring to was ordered in the emergency room.

Q. Will you please tell us that? A. Admitted to medical service and complete bedrest with side rails, 0-2 tent.

Q. Please tell us what 0-2 tent means. A. I understand it means oxygen tent.

One thousand chloric, 200 milligrams sodium diet. Sodium nembutal, 100 milligrams, P.O.H.S., milk of magnesia, 30 cc's, H.S.

Blood pressure and pulse rate, respiratory rate, Q-4 hours. Rectal temperature, QID, and ace bandage to both legs to mid thighs.

Chest x-rays in a.m. when feasible. EKG in a.m. C.B.C. and urinalysis, F.G.O.T. in a.m. FBS and BUN in a.m. Digitalis, (hold leave). 100 milligrams, P.O.T.I.D. for the first five consecutive days and then 1 Q.I.D.

Diurelm 0.5 grams, P.O.B.I.D.

Mercuhydrim, 2 cc's.

On admission there is a little notation here and I can't read it. I don't know what it means. Aminophylline, [58] rectal suppositories 500 milligrams, Q.6-H.

Potassium chloride, I gram, D.I.B. phenobarbital 15 milligrams, D.I.T.

THE COURT: Go slower, please. This is very difficult for the reporter.

MR. COLLINS: May I look to see where she is reading from?

THE COURT: Yes, both of you may.

THE WITNESS: Potassium chloride, I gram, B.I.D.

Demerol, 75 milligrams, Q-4 hours and then once again, it looks like the same little writing that I don't know what it means.

Q-4 hours, P.R.N. for severe dyspnene. Chart intake and output and then it is signed by Dr. Pajarrillo.

BY MISS KENNEDY:

Q. Now Mrs. Willoughby, I won't have you read the treatment during his first admission, but can you tell us what was the date of discharge from this admission on December 8? A. 3-5-63.

THE COURT: Would you give that to me again, please.

THE WITNESS: 3-5-63.

BY MISS KENNEDY:

Q. Now, did there come a time, according to your records, [59] that there were subsequent admissions to the hospital?

Was Mr. Stansbury admitted again? A. Yes, ma'am.

Q. What was that admission date, please? A. 4-12-63.

Q. And will you state for us the kind of treatment and the doctor and what was done to him during this admission from the records? A. He had skin grafts at this time and removal of a retracted scar.

Q. Who was the doctor at that time, Mrs. Willoughby? A. Dr. James W. Braden.

Q. And when was he discharged after the second admission? A. 5-6-63.

Q. Now, did there come a time that he was admitted again for these same disabilities, Mrs. Willoughby? A. He was admitted 7-12-63.

Q. This was the third admission? A. Yes, ma'am.

Q. All right. And who was the doctor and what does the record show that he was treated for? A. This time it was Dr. Young, J. Rogers Young, and they did a plastic revision of scar and skin grafts.

and tell us when Mr. Stansbury was admitted to the hospital? A. Admission date is 12-8-62.

Q. All right. Does the record show what, if any, treatment he was given on that date? A. On that particular date?

Q. Yes, ma'am. A. I will refer to the physician's order sheet. It is quite lengthy, everything that was ordered.

THE COURT: Are you interested in any particular part?

BY MISS KENNEDY:

[57] Q. Does your records show what, if anything, was done in the emergency room on December 8, 1962? A. Yes. These orders I was referring to was ordered in the emergency room.

Q. Will you please tell us that? A. Admitted to medical service and complete bedrest with side rails, 0-2 tent.

Q. Please tell us what 0-2 tent means. A. I understand it means oxygen tent.

One thousand chloric, 200 milligrams sodium diet. Sodium nembutal, 100 milligrams, P.O.H.S., milk of magnesia, 30 cc's, H.S.

Blood pressure and pulse rate, respiratory rate, Q-4 hours. Rectal temperature, QID, and ace bandage to both legs to mid thighs.

Chest x-rays in a.m. when feasible. EKG in a.m. C.B.C. and urinalysis, F.G.O.T. in a.m. FBS and BUN in a.m. Digitalis, (hold leave). 100 milligrams, P.O.T.I.D. for the first five consecutive days and then 1 Q.I.D.

Diurelm 0.5 grams, P.O.B.I.D.

Mercuhydrim, 2 cc's.

On admission there is a little notation here and I can't read it. I don't know what it means. Aminophylline, [58] rectal suppositories 500 milligrams, Q.6-H.

Potassium chloride, I gram, D.I.B. phenobarbital 15 milligrams, D.I.T.

THE COURT: Go slower, please. This is very difficult for the reporter.

MR. COLLINS: May I look to see where she is reading from?

THE COURT: Yes, both of you may.

THE WITNESS: Potassium chloride, I gram, B.I.D.

Demerol, 75 milligrams, Q-4 hours and then once again, it looks like the same little writing that I don't know what it means.

Q-4 hours, P.R.N. for severe dyspnene. Chart intake and output and then it is signed by Dr. Pajarrillo.

BY MISS KENNEDY:

Q. Now Mrs. Willoughby, I won't have you read the treatment during his first admission, but can you tell us what was the date of discharge from this admission on December 8? A. 3-5-63.

THE COURT: Would you give that to me again, please.

THE WITNESS: 3-5-63.

BY MISS KENNEDY:

Q. Now, did there come a time, according to your records, [59] that there were subsequent admissions to the hospital?

Was Mr. Stansbury admitted again? A. Yes, ma'am.

Q. What was that admission date, please? A. 4-12-63.

Q. And will you state for us the kind of treatment and the doctor and what was done to him during this admission from the records? A. He had skin grafts at this time and removal of a retracted scar.

Q. Who was the doctor at that time, Mrs. Willoughby? A. Dr. James W. Braden.

Q. And when was he discharged after the second admission? A. 5-6-63.

Q. Now, did there come a time that he was admitted again for these same disabilities, Mrs. Willoughby? A. He was admitted 7-12-63.

Q. This was the third admission? A. Yes, ma'am.

Q. All right. And who was the doctor and what does the record show that he was treated for? A. This time it was Dr. Young, J. Rogers Young, and they did a plastic revision of scar and skin grafts.

[60] Q. What was the date of discharge of this third admission? A. 8-9-63.

Q. Now, Mrs. Willoughby, did there come a time when he was admitted again for these same disabilities? A. The next date was 9-9-63.

Q. For what was he treated? A. For burn contraction of anterior neck and arthritis of cervical spine and the secondary diagnosis was edema of pharynx and trachea.

Q. And who was the doctor? A. Dr. Braden.

Q. What was Dr. James Braden at -- James W. Braden, yes. A. And Dr. Young also. They both had signed this chart.

Q. Dr. J. Rogers Young? A. Yes, ma'am.

Q. And when was the date of discharge for this admission? A. 9-30-63.

Q. Now, did there come a time when there was a fourth admission, which Mr. Stansbury was treated for these same disabilities? A. Yes. That was dated 12-2-63.

Q. And what was the kind of treatment and who was the doctor? [61] A. Dr. Young was the doctor and they did a split thickness skin graft through neck.

Q. Anything else? A. That is all that is listed on the final sheet.

Q. And what is the date of discharge for this fourth admission? A. 1-10-64.

Q. From your records, Mrs. Willoughby, does it show that there was a fifth admission of Mr. Stansbury for these same disabilities? A. Yes, and it is dated 5-13-64.

Q. What kind of treatment was given and who was the doctor? A. Dr. Braden was the doctor and they performed a plastic of scar, left.

THE COURT: What was the last word?

THE WITNESS: Left. L-e-f-t.

BY MISS KENNEDY:

Q. What was the date of the discharge after his fifth admission, Mrs. Willoughby? A. 5-28-64.

Q. Did there come a time when there was a sixth admission of Mr. Stansbury for these same disabilities? [62] A. No, ma'am. That is the only admission regarding the surgical procedures.

Q. Was he admitted after -- he was not admitted after 5-28-64? A. I have two admissions.

Q. What do they show? A. I have not given you that and one is back in '63, but it was a medical.

Q. May I see that please? A. Yes.

Q. Will you please tell us about this admission here, Mrs. Willoughby? A. He was admitted to Casualty Hospital 2-1-65, and was discharged 2-5-65.

Q. And will you read us the notes you have there on the first page? A. This is the history. "This is a case of a 65 year old male who was admitted because of chest pain, vague in character, accompanied by shortness of breath. Because of this condition he decided to go to a drug store and on his way he fell down hurting his chest against the snow, and then initials p.p.h.

"Patient claimed he had several heart attacks in the [63] past. He likewise was involved in 0-2 tent explosion, hurting and sustained severe burns. M.H., no allergy to any medicine so far. F.H. non-contributory. Rule out pneumothorax A.S.H. D., coronary insufficiency."

Q. Who was the doctor there? A. The resident was Gonzales.

* * *

[64] GERTRUDE F. EMERT

* * *

DIRECT EXAMINATION

BY MISS KENNEDY:

Q. Will you please state your name and address? A. Gertrude Emert, 10513 North Place, Upper Marlboro, Maryland.

Q. What is your occupation, Miss Emert? A. I am a registered nurse.

Q. Where do you work? A. Casualty Hospital.

Q. How long have you been at Casualty Hospital? A. For most of the last twenty years.

[65] Q. Now, directing your attention to on or about December 8, 1962, were you on duty at the hospital on this date? A. Yes, ma'am.

Q. What are your hours of duty? A. Ordinarily, they were eleven to seven, but at that time I relieved the three to eleven supervisor on Saturday on her day off.

Q. And so, what time had you been there that particular time? A. That's why I was there that day at that time.

Q. All right. Now, Miss Emert, do you recall a patient by the name of one Joseph S. Stansbury who was admitted there on December 8, 1962? A. Yes, ma'am.

Q. Were you the supervisor at that time? A. Yes, ma'am.

Q. Were there other nurses on duty? A. Yes, ma'am.

Q. Who were some of the other nurses? A. Well the nurse in particular was Miss Kim on that floor. She had aides under her.

Q. And approximately how many patients were on the ward? [66] A. Oh, well, they average about 35 to 40 I guess on the average. I just don't know how many were there at that time.

THE COURT: Keep your voice up, please.

BY MISS KENNEDY:

Q. And there were you and Miss Kim at that time? A. I was -- I was supervisor of the hospital at that time on that particular floor, definitely.

Q. Do you recall what treatment was being administered to Mr. Stansbury on December 8? A. I was all over the house, and I couldn't definitely answer. I was not the nurse on that particular section.

Q. Did it ever come to your attention that he was placed in an oxygen tent? A. Yes, I knew that.

Q. You did know that? A. Yes.

Q. I see. Now, Mrs. Emert, I think you said you had been in the hospital for about twenty years? A. Yes.

Q. What are the ordinary or usual precautions that are taken to insure patients' safety when they are placed in oxygen tents. A. Well, I mean, if they are certainly coherent, they are [67] explained to them what -- you know -- what the procedure is and put to bed and explained to them what they are to do, and when they are able to understand what you are talking about, of course.

Q. I see. Do you have any personal knowledge as to who, if anyone, spoke to Mr. Stansbury or whether he was aware of his surroundings at the time, and what his condition was? A. Well I know he was aware of his surroundings because I had seen him downstairs in the emergency room, and they asked me for a bed,you know, to put him in.

I assigned the bed.

Q. All right. Will you just describe for us an oxygen tent, the type and kind of bed Mr. Stansbury was in? A. I am sorry I don't understand.

Q. Will you describe the type and kind of bed with the oxygentent -- explain to the ladies and gentlemen of the jury the -- A. Well, they are put in the same kind of bed as anybody else, an ordinary hospital bed, and the only thing that is -- the only difference is we put them in an oxygen tent and they are given a call bell.

Q. A call bell? A. Yes, they are given a different type of call bell to [68] call the nurse in to insure their safety in that way. They are put in an ordinary hospital bed with an oxygen tent which is a tent with a canopy over the bed.

Q. And that canopy covers the entire bed? A. The top of the bed from the waist up.

Q. I see. Now, how are patients usually dressed when they are placed in these oxygen tents? A. Well they are usually dressed in just

the hospital gown and cotton blankets are used to secure the canopy to the bed.

Q. I see. And to the best of your recollection, was Mr. Stansbury in a hospital gown under this tent? A. To the best that I know, yes.

Q. Now who operates the oxygen tent? Who had control over this oxygen tent? A. Well, the oxygren tents are -- they have the wall oxygen and they are put in there and there is not much of a control necessary now since there is oxygen right in the wall.

It is connected to the wall oxygen.

Q. Now, on December 8, 1962, what type of device did you have at that time? A. I can't answer that. I am not sure what rooms have wall oxygen, but I think it was wall oxygen in that particular [69] room. Some of the rooms have them and some of the rooms we still have to use the tank-type.

Q. I see. You don't recall whether or not the tank was in the room with Mr. Stansbury or not?

Is that what you are saying? A. I wouldn't swear to it. I really can't swear to it. I don't know. I think it is wall oxygen.

THE COURT: Is that your best recollection?

THE WITNESS: Yes.

THE COURT: Keep your voice up, madam, please.

BY MISS KENNEDY:

Q. Could you tell us whether or not Mr. Stansbury was left unattended when he was placed in this oxygen tent? A. I couldn't answer that. I was not there full time.

Q. Now, Mrs. Emert, of your own personal knowledge, do you know, prior to the time of December 8, whether or not there were any inspections made of your oxygen tents? A. I have nothing -- I don't have anything to do with that. I mean, I wouldn't have any idea. I am sure there is but somebody else would have to answer that.

Q. Your answer is that you don't know about that? A. No.

[70] Q. Well now, I don't think I asked you this question before,

but you are the night supervisor, is that right? A. Yes.

Q. Who had the primary responsibility of supervising or who had the primary responsibility of supervising the tent in which Mr. Stansbury was placed on December 8, 1962? A. Well I don't know just how to answer that in that I mean he was placed in it and the nurse on the floor is a qualified registered nurse, and so she is the one who at that time would check the oxygen tent and if there was anything the matter with it, she would naturally call whoever is in charge of it.

Q. I see. Is it the duty of the nurse to check frequently patients who are placed in oxygen tents? A. Yes, it is.

Q. Now do you recall how many other persons were in the room where Mr. Stansbury was? A. One.

Q. One other person? A. Yes.

Q. I see. Do you recall whether or not there was a special nurse assigned to Mr. Stansbury? A. They have their assigments. The girls have their [71] assignments and which one it was, I don't know, but they do give different assignments.

THE COURT: Let me interrupt to ask a question.

Miss Kennedy, are you asking whether he had a private nurse as distinguished from a nurse on the floor?

MISS KENNEDY: No, Your Honor. I am asking whether or not, when he was placed in the oxygen tent, was there one of the nurses on the floor who was specially asked to supervise him in this oxygen tent?

THE WITNESS: As far as nurses are concerned, you realize there is one nurse on duty and the aides are the ones that are actually assigned to the patients under their supervision. I mean there is usually what we call or practical nurses, in some instances, that are assigned to the patients under the supervision of the graduate nurse.

BY MISS KENNEDY:

Q. Do you know of your own personal knowledge whether or not there were such aides on duty, nurse's aides, in the hospital that night? A. Yes, there was.

Q. And is it the custom and habit to assign nurse's aides to watch patients in oxygen tents? A. Yes because -- I mean, unless they have a private [72] duty nurse, they are automatically on floor care and that is the procedure.

Q. Are there any special precautions taken or any special instructions given the nurse's aides relative to persons being placed in oxygen tents? A. Yes, ma'am. They all know the procedure.

Q. Well do you mind telling me what the procedure is? A. I have said that, that they are placed in the oxygen tent, and given instructions as to what they are to do and what they are not to do.

Q. Well what are some of the instructions? A. They are instructed -- for one thing they are instructed not to smoke. They are instructed to -- as I say, they are given a specal call bell which they use to call the nurse for anything because most patients who are put in oxygen tents are certainly on complete bed rest, and they are advised of that and should know it.

Q. What are some of the precautions and instructions that you give the nurses and the nurse's aides with respect to taking care of the patients who are in an oxygen tent?

What are they required to do, if anything? A. They are required to caution patients of that and they are certainly required to know the procedure. They have [73] been taught how to take care of the patients and most of them have had classes in that.

Q. Are the aides or nurses specifically instructed to see that patients don't have any matches? A. Well they are not taken away from them, if that is what you mean. They are told not to smoke, but you don't take them away when they are coherent and know what they are doing.

Q. You don't take the matches away from patients? A. No. Usually they are told and they are taken away from them in that they are kept with their personal effects.

Q. Now, do you have any personal recollection as to about what time the fire started on December 8, 1962? A. Some time after ten p.m. but just exactly what time after, I don't know.

Q. Now, what, if anything, as you recall, was done after the fire started? A. Well the fire was put out by the nurse on duty. And the patients were immediately taken out of the room, both of them, and the police and firemen were all called and they were there within minutes.

By the time they had gotten me and I went up there, the patients were already out of the room and the fire was out.

[74] Q. Now, do you recall whether or not there was any fire extinguishing equipment in this room where this oxygen tent was being used? A. Not in the room, but they are out in the hall right out of the room. None of the rooms themselves have fire extinguishers, but they are at various places throughout the hallway.

Q. All right.

MISS KENNEDY: Your witness.

CROSS EXAMINATION

BY MR. COLLINS:

Q. Mrs. Emert, I understand that you are a night nurse? A. Yes, sir.

Q. Did you work that night? A. Yes, sir.

Q. Do you have to work tonight? A. Yes, sir.

Q. You mentioned that you saw Mr. Stansbury in the emergency room when he came in. A. Before he went upstairs and maybe not just when he came in, but before he had been taken upstairs.

Q. Was he walking around at that time when you saw him? A. He was in one of the emergency rooms.

[75] Q. Did you by any chance see him walk outside to say to his son that he need not wait for him? A. I didn't hear your question.

Q. Did you by any chance see him walk outside and say to his son that he need not wait for him, that he was going to stay overnight, or

stay in the hospital? A. I didn't see that in particular, no.

Q. All right. You mentioned that he was aware of his surroundings. Was he talking? A. Yes, sir.

Q. Was he coherent? A. Yes, sir.

Q. Now, with respect to a man who has shortness of breath and has a heart -- fears there is a heart problem and in the emergency room, how is he then taken to the room in the hospital? A. Well --

Q. Does he walk to the room or is he in a wheelchair, or how does he go? A. They go in a -- usually on a stretcher. If he is not too bad, they will go up in a wheelchair.

Q. If they are not too bad? A. Yes.

[76] Q. Do you know how he went up that evening? A. I am sorry I can't answer that because I don't exactly remember.

Q. Do you know who took him up that evening? A. One of the orderlies as far as I can recollect and it was Orderly Stewart, the one they call Stewart.

Q. Robert Stewart? A. Yes.

Q. Now, was it the orderly's job at that time to take patients up and to assist them in getting into bed and things like that? A. Yes, sir.

Q. You were asked about the instructions given to nurses. Are orderlies also instructed to advise patients not to smoke? A. Yes, sir, because only certain orderlies are allowed to put oxygen up and they are instructed before they are given permission to do that particular work.

Q. I see. After the accident of this evening of which occurred shortly after 10:00 p.m. or somewhere after ten o'clock, did you go to Mr. Stansbury's room? A. I did not go in the room because when I got up there, his bed was already out in the hall and all the doors were closed to all the rooms.

[77] Q. Did you look at his bed? A. Yes, I did.

Q. Did you talk to Mr. Stansbury at all? A. Just for a few minutes, yes.

Q. Did you ask him what happened? A. No, I did not.

Q. Was there anyone there asking him what happened? A. Not at that particular time, but just minutes afterwards the police came and were talking to him.

Q. Did you hear him talk to the police? A. No, I did not.

Q. When the bed was in the hall, was the oxygen tent still there? A. No the oxygen tent was in the room.

Q. Still in the room? A. Yes.

Q. Was Mr. Stansbury on the bed then? A. Yes, they brought bed and all out.

Q. Did you notice whether or not there were any signs on the door of Mr. Stansbury's room? A. Really I can't answer specifically. As I say, I didn't notice at the time because there were other things I had to do. They go up with the tent. They are put up but I couldn't --

[78] Q. Now you mention Mr. Stansbury was put over -- with respect to the bed Mr. Stansbury was on, was there anything else on it that you noticed? A. There was a pack of cigarettes.

Q. Where were they? A. Lying right beside him.

Q. Do you recall what kind they were? A. No, I don't.

Q. You mentioned that the police talked to Mr. Stansbury. A. Yes.

Q. Was Mr. Stansbury put in another room in the hospital? A. Yes, sir.

Q. Before he was put in another room in the hospital, was it planned that he would leave Casualty Hospital? A. The police wanted to transfer him that night, and asked if he could be transferred to D.C. General, and I told them I would ask the doctor and the doctor said no, right then he was not -- not in a condition at that particular time to be transferred.

Q. What part of D. C. General was he to be transferred to?

MISS KENNEDY: I object.

* * *

[80] REDIRECT EXAMINATION

BY MISS KENNEDY:

Q. Mrs. Emert, I notice in respect to a question Mr. Collins asked you, that you said that you saw a pack of cigarettes on Mr. Stansbury's bed? A. Yes, ma'am.

Q. Of your own personal knowledge, do you know who put the package of cigarettes there? A. No, I don't know.

MISS KENNEDY: No further questions.

Will you indulge me for a moment?

THE COURT: Yes, certainly.

MISS KENNEDY: No further questions.

THE COURT: Did I understand you to mean by your testimony that the cigarettes were found on the bed after the fire?

[81] THE WITNESS: Yes, sir.

THE COURT: Is that all?

MR. COLLINS: Yes.

THE COURT: All right, madam, you may step down.

Is this witness excused?

MISS KENNEDY: Yes, after one other question.

BY MISS KENNEDY:

Q. Did you notice, Mrs. Emert, the extent of the fire on the bed? Did you see the bed after it was burned? A. Yes, I saw the bed.

Q. And what was the condition of it? A. Well just the top part. I can't just really remember exactly how bad it was. I mean, it was mostly at the top part of the bed, you know.

There wasn't really a lot of fire, but it was just up around the top part of the bed.

Q. Was the floor burned also? A. No, the floor was not burned. The nurse that was on duty, Miss Kim, burned both of her hands severely when she put the fire out.

MISS KENNEDY: Thank you.

THE COURT: You may be excused.

MR. COLLINS: Yes.

[82] MISS KENNEDY: Dr. Braden please.

DR. JAMES W. BRADEN

was called to the witness stand on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS HADEN:

Q. Would you state for the Court, your full name, doctor? A. James W. Braden.

Q. And what is your address, Dr. Braden? A. 201 Eighth Street, Northeast, Washington, D.C.

Q. And are you a doctor who practices at Casualty Hospital? A. Yes.

Q. What is your position there? A. I am Chief Surgeon.

Q. Were you there on December 8, 1962? A. I am going to have to refer to the hospital records to refresh my memory.

THE COURT: You are entitled to do that, sir.

What was your question?

MISS HADEN: Was he there at that hospital on December 8, 1962.

THE WITNESS: Well, I don't know and I can't tell [83] from the records. I am pretty sure I was, but the records -- I believe I only had a short time this morning to examine these records, but I believe the records show that I first saw this patient on the 18th of December.

BY MISS HADEN:

Q. Joseph S. Stansbury you are referring to, the patient? Joseph S. Stansbury was the patient you were referring to? A. Yes.

Q. Then you did not see him on the 8th of December, 1962? A. No, I don't think so.

Q. Do you recall there was a fire at the hospital on December 8, 1962? A. No, ma'am.

Q. An oxygen tent was burned with Mr. Joseph Stansbury in the tent? A. No, I don't know about that. I didn't know about that until quite some time later.

Q. Then you say you first saw this patient on the 18th of December, 1962? A. Yes. I believe the records indicate that I operated on him -- the record indicates that I operated on him on December 24th, 1962, but I believe he was transferred to the [84] Surgical Service on the 18th of December, 1962 and I would see him shortly thereafter.

Q. You examined him then before the operation on the 24th? A. Oh, yes.

Q. What was the condition of this man when you examined him prior to the 24th of December, 1962? A. He had burns of the neck and his chest and his arms -- both of his arms down towards the elbow. Almost to the elbow, I believe.

Q. What degree burns were they? A. They were third degree burns.

Q. Would you tell the jury what third degree burns are and the effect it has on the human body? A. What is the last part of the question?

Q. And the effect of third degree burns on the human body? A. Third degree burns -- well first of all, first degree burns is sun burn and second degree burns is where you have blisters and third degree burns involves the skin, and complete thickness of the skin, and it may also involve muscles or whatever happens to be under the skin.

* * *

[88] THE WITNESS: The first operation would be cleaning of the wound, cleaning the excess granulation tissue. The part that is burned tends to grow up and we clean that off and make it smooth in preparation for a skin graft. This was done on December 24th and at that time the patient was put to sleep and then the burns were redressed which consists of removing the dressings and reapplying new dressings.

On the 27th and again on January 3, the wounds were treated again. Here again the patient was given a light anesthetic and put to sleep lightly, and then the burns were redressed again.

On January 6th and then on January 10th, is when we did the skin grafts, and then we did redressings on January 16 the 20th, the 23rd, the 26th, January 30th, February 3, and this is 1963 now, and then again on February 7, 1963 was another skin graft and redressings done on the 17th, 20th and 27th and I skipped one. There was one on the 23rd, in other words, about every three days we redressed these burns through to March 3, and then he was discharged at that time on March 5, 1963.

BY MISS HADEN:

[89] Q. How many skin grafts were performed on Mr. Stansbury, Dr. Braden? A. That would be two, I believe.

Q. That was two for you? A. Ma'am?

Q. I believe, doctor, the records show that he had about seven skin grafts. A. I am talking about the ones that I did.

Q. Do you know what other doctor performed any? A. Dr. Young.

Q. Now, when you operated on his neck, was he suffering at that time with larnyx trouble? A. He had trouble -- the neck was drawn down. The chin was drawn down against his chest from the scar tissue, the burn.

Q. Now did that render him disable from -- could he move very easily around the neck area, turning his head, etcetera? A. No that would restrict it somewhat.

Q. And over what period of time was this man disabled, Dr. Braden, insofar as work was concerned or enjoyment of being active in life? A. He was disabled insofar as work was concerned from [90] the time I first saw him through May 6, 1963 of my personal knowledge and reflecting again and refreshing my memory from the records because he came back to the hospital on April 12th, and remained in the hospital through May 6th, and at that time we did another skin graft plus more redressings of the burns.

* * *

[91] Q. Dr. Braden, what part of the face of Mr. Stansbury was burned when you first saw him, what part showed signs of having been burned? A. From the chin along here down. The chin down and the chest and both shoulders. (Indicating)

* * *

[92] DR. JOSEPH ROGERS YOUNG

was called to the witness stand on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS HADEN:

Q. Dr. Young will you state to the Court your full name and to the jury please? A. Joseph Rogers Young.

Q. And where do you live, Dr. Young? A. Where do I live?

[93] Q. Yes. A. I live at 3213 Thornapple Street, Chevy Chase, Maryland.

Q. Where do you practice medicine? A. My office is at 201 8th Street, Northeast, Washington, D.C., and most of my practice is conducted at Casualty Hospital, where I have been Chief of Staff since 1939 and Senior Attending Surgeon.

* * *

Q. When did you first see him? A. On or about December 2, 1963.

Q. Did you examine him on December 2, 1963? A. I did.

Q. What was his condition at that time? A. At that time this patient -- my attention was directed particularly to the results of a burn that he had sustained, and he had scar tissue with some contraction of the neck. Chin-chest contracted, we call it, due to damage to [94] the skin and some of the underlying tissues resulting from a burn.

Q. Was it an open wound on his neck at that time? A. I would have to refer to the records. I don't recall.

Q. Well, do you mind referring to the records, doctor? A. No. As far as I can tell there was no open wound at that time. I am looking

at both my operative report and also the pathology report. As far as I can tell there is no evidence of any granulation tissue that would indicate an open wound. Apparently there was a healing with some contraction.

Q. Did you operate on him in December, doctor? A. Yes, I did.

Q. And what operation did you perform on him? A. On December 11, 1963, I took him to the operating room and under general anesthesia excised or cut out some of the scar tissue between his chin and the chest that is, the front of the neck, and then they took a skin graft four inches in width and eight in length and removed from the left side of the abdominal wall which is right across here, and this graft was sixteen thousandths of an inch, point 016 inches thickness.

I notice that it says sixteen hundreds but that would [95] be too thick, it is .016 inches.

The scar tissue was excised, cut out, and then this area was resurfaced with the skin graft placed in this manner and the neck extended. It has been down and it was brought up.

Q. So that enabled him to hold his head up a little bit more? A. Considerably more at that time, yes.

Q. Is that the only operation that you performed on this man? A. I did the redressings after that, that is, on December 16th, and I took him to the operating room again and took the dressings off and made a notation that the graft was highly successful.

The grafted area was redressed and the patient left the operating room in good condition.

Then I saw him daily during the period from December 2, 1963 until January 10, 1964 when he was discharged from the hospital.

Q. Did you see him anymore after that date? A. Yes, I would see him occasionally from time to time when he would return to the outpatient clinic, and then I had him readmitted to the hospital on July 12, 1963, for another [96] skin grafting operation.

THE COURT: Doctor, excuse me. Did I understand you to say that he returned again on July 12, 1963?

THE WITNESS: Yes, Your Honor. That was before this wasn't it? I am sorry, I got the cart before the horse, I first saw him in July of 1963, that is correct, and instead of December, but the procedure was identical.

THE COURT: All right, sir. You first saw him in July in 1963?

THE WITNESS: I am sorry. Yes, July 12th and took care of him until August 19th, 1963. The operation being performed on July 15th, of 1963.

At that time in addition to the skin graft which I described, four inches and eight inches in length, we took a second one from the right thigh, three inches in width and six inches in length and this graft was successful.

He was in the hospital until August 19th, 1963.

Then I saw him as an out-patient at intervals until December 2, 1963 and operated on him on December 11, 1963 and took care of him until January 10, 1964.

BY MISS HADEN:

Q. And did you see him any more after -- what is the last date? [97] A. January 10th, 1964.

Q. Did you see him anymore after January 10th, 1964? A. I am sure that I saw this gentleman in the outpatient department from time to time. He would come by to see me when he was there, but I don't have any fixed dates.

Q. Did he ever get to the place, doctor, where he could turn his neck from side to side as well as hold it up higher? A. As a result of two skin grafting operations, he would be able to elevate his chin and he was able to turn a certain amount, but it was definitely a restriction of motion in all directions of the neck.

Q. Was that the extent of your -- was that the extent of your services rendered to Mr. Stansbury, doctor? A. That's right.

* * *

[100] Q. Doctor, would you say that Mr. Stansbury was disabled insofar as doing any work with his hands up until the time that you -- through the time that you saw him in 1964 and later as an out-patient of the hospital? [101] A. Well, now, if you mean is he totally disabled and not able to do anything, I would not say that he was because his disability was pretty well limited to his head and neck, that is, he couldn't turn his neck and couldn't look down or up very much.

As far as his hands were concerned, or the rest of his body, his legs and arms, I don't believe there was anything particularly -- any disease or abnormality of the extremities.

Of course, his general physical condition was not always good.

MISS HADEN: Thank you, doctor.

THE COURT: Mr. Collins, do you have any questions?

MR. COLLINS: No questions.

THE COURT: All right, doctor, you are excused at this time. Thank you. One moment please.

Will counsel come to the Bench a minute?

(Bench Conference.)

THE COURT: Have you any stipulation as to hospital bills or doctor bills?

MISS KENNEDY: We have subpoenaed the financial clerk and she will tell what the doctor bill is but maybe we had better ask him.

THE COURT: Excuse me for interrupting you, but in [102] the interest of time, I understood this doctor to say that what was done was the cause of these burns without regard to who is responsible for it, and so you won't need him for that purpose.

The question is what the dollar and cents add up to. Is that it?

MR. COLLINS: Yes, but it was paid by the District of Columbia. He was an indigent.

MISS KENNEDY: Would you stipulate that his bill is a thousand dollars, and that the hospital bill was seven thousand four hundred and twenty dollars?

MR. COLLINS: I will do this. I will stipulate as to what the bills were if the jury is advised who paid the bills.

MISS KENNEDY: No.

MR. COLLINS: Wait a minute.

THE COURT: Let me say this to you. You had better bring your witness and we will see where we will move from there.

MR. COLLINS: I think the portions of this record may relate to the heart condition.

THE COURT: While these doctors are here, it seems to me you had better have some tie in between this burn and the bill because if this man was there for an entirely different [103] purpose, how much was chargeable to that?

I think you would be well advised if you can do that.

MISS KENNEDY: Will you indulge us for a moment then?

THE COURT: Yes.

(End of Bench Conference.)

BY MISS HADEN:

Q. Doctor, was there a bill for your services? A. I have not formally submitted a bill. I was asked the value of my services and I made an estimate of one thousand dollars for the surgery and the care.

Q. One thousand dollars? A. Yes.

Q. Was this in connection with the treatment that you just described, the grafting because of the burns? A. That is correct.

MISS HADEN: Thank you doctor.

CROSS EXAMINATION

BY MR. COLLINS:

Q. You never submitted that bill, had you, doctor? A. No.

Q. You were asked by plaintiff's attorney to issue [104] what would be a reasonable bill? A. What the values of the service is and that is my estimate.

THE COURT: Is this a reasonable and fair charge for the serv-

ices that you rendered instant to the burns and treatment thereof by you?

THE WITNESS: I considered it so, yes.

THE COURT: Does that embrace the other doctor or are you speaking only for your particular services?

THE WITNESS: My own services.

THE COURT: Is that all from this doctor?

MISS KENNEDY: Yes. Dr. Braden please.

THE COURT: All right doctor you may step down.

Dr. Braden, come around again please. Have a seat, sir, you have been previously sworn.

JAMES W. BRADEN

resumed the witness stand, previously sworn was examined and testified further as follows:

REDIRECT EXAMINATION

BY MISS KENNEDY:

Q. Dr. Braden, you have told us about several -- you have told us about the treatment and operations that you performed on the decedent, Joseph S. Stansbury. Would you be [105] good enough to tell us what the reasonable value of the services you rendered were in treating Mr. Stansbury for this disability. A. I guess about seven hundred dollars.

Q. Seven hundred dollars? Is that a fair and reasonable estimate? A. I would think that would be real fair.

THE COURT: Now, doctor, are you saying that is the fair and reasonable value of services instant to the burns only as distinguished from any other services?

THE WITNESS: Yes, Your Honor.

RECROSS EXAMINATION

BY MR. COLLINS:

Q. You never rendered that bill, did you doctor? A. No, sir.

MR. COLLINS: Nothing further, Your Honor.

THE COURT: All right, sir, you are excused. Thank you.

MISS KENNEDY: If Your Honor please, I did forget Mrs. Willoughby. She was on the stand. Can we recall her and excuse her?

THE COURT: Will you need her further, Mr. Collins?

MR. COLLINS: No. The hospital records are in evidence. I understand --

[106] THE COURT: I understand the hospital records are in evidence without objection by both parties subject to the New York Life case.

MISS KENNEDY: Yes.

MR. COLLINS: I have no objection. I think it would be nice for Miss Willoughby to leave.

THE COURT: Then will you tell Mrs. Willoughby she is excused by both counsel?

MISS KENNEDY: Yes.

ROSA LEE MIMS

was called to the witness stand on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS KENNEDY:

Q. Will you state your name and your address? A. Mrs. Rose Lee Mims.

THE COURT: How do you spell your last name?

THE WITNESS: M-i-m-s.

THE COURT: Thank you.

BY MISS KENNEDY:

Q. What is your address? A. 424 --

MR. COLLINS: May we approach the Bench?

[107] THE COURT: Yes, sir.

(Bench Conference.)

MR. COLLINS: Your Honor, when this came out, this case came out of pretrial, the parties were required to exchange the names and address of witnesses. After pretrial, I think last year sometime, I wrote a letter and advised her that I had never gotten a witness list. This case was alerted for trial a week ago yesterday, and on Tuesday afternoon I received a witness list.

I have made no objection with respect to the witness list because I wanted this case to go forward but this name doesn't appear on this list that I got in May of 1966.

MISS KENNEDY: What happened, Your Honor, and I would like to direct my answer to what he said. Inadvertently this case was dismissed by the clerk downstairs under certain rules and we had made a list of witnesses which we subsequently gave to Mr. Collins, but due to the fact that we were trying to get back into Court, we overlooked this one. As he said, a week or so ago, we located the folder and saw that it had not been filed, and, however, the defendant has never compiled with the pretrial statement and we are not complaining about that.

They have not done that, and we are not complaining.

[108] MR. COLLINS: What haven't we done?

THE COURT: Let me interrupt you. We may be talking about something that is not material.

MISS KENNEDY: This witness is a nurse and she has been a nurse for ten years and she just came to my attention. We were trying to get some people and --

THE COURT: What will she testify to?

MISS KENNEDY: She will testify that she was a nurse for ten years and that during that time she has been in charge of and super-

vised patients in oxygen tents, and at various hospitals and the various precautions that are necessary for a person who is placed in an oxygen tent. That is all we want.

THE COURT: Where is she from?

MISS KENNEDY: She has been in three or four different hospitals but not from Casualty, but Children's Hospital, D. C. General Hospital, Georgetown Hospital and I think one in Maryland, but at different hospitals.

MR. COLLINS: I object to her testimony, Your Honor.

THE COURT: It looks to me as if this is a material witness, Miss Kennedy, and under those circumstances, and at this late date, if they object to it, I am afraid I will have to sustain their objection, and I do it for this reason. First, [109] I think it is right and if I don't do it, I might prejudice your case which I don't want to do. I want the jury to have a chance, if we ever reach that.

I think under these circumstances that I would be compelled to sustain the objection.

MISS KENNEDY: Very well. May I just say that in our pretrial statement we reserved the right to call any additional witnesses who may become known to us at the time of trial.

THE COURT: Are you saying to the Court now, that you did not know of this witness until after you wrote this letter?

MISS KENNEDY: I didn't know that I could get her for a witness. We called several nurses and couldn't get them to appear. We asked her yesterday. I didn't know that we could get her. I just asked her yesterday.

THE COURT: I have not found the provision you were referring to.

MISS KENNEDY: Plaintiff's pretrial statement.

THE COURT: Yes.

MISS KENNEDY: Let me see it, Your Honor.

THE COURT: Why don't we excuse the jury now and we will finish this and take the rest of the recess.

(End of Bench Conference.)

[110] THE COURT: Ladies and gentlemen, we are going to deal with a matter that does not concern you. At this time you are excused for ten minutes with the same admonition.

(Jury was excused from the Courtroom.)

(Bench Conference.)

MISS KENNEDY: Unless the pretrial clerk didn't put them in here --

THE COURT: I thought it would be in the front too. Do you have a copy of it, Mr. Collins?

MR. COLLINS: I will look. This is plaintiff's pretrial statement, Your Honor.

MISS KENNEDY: Could I see that?

MR. COLLINS: You asked for an exchange of names and addresses of witnesses within thirty days.

MISS KENNEDY: Well, I am sorry, Your Honor. I always say that. It was an oversight.

THE COURT: I have no challenge of your good faith.

Mr. Collins, insofar as this witness is concerned, you will be afforded an opportunity, after the examination, to look into this matter. I am disposed to permit her to testify under the facts stated here.

MR. COLLINS: Your Honor, the problem I have is that this case was calendared for a long time and it was pretried, [111] and it came up for trial. Frankly, I asked for names of witnesses and the case was scheduled for trial last Wednesday, and we have been waiting and I don't know what would happen and then I got a witness list, as I say, Tuesday. Actually, I am anxious to get the case over with. I don't want to object.

THE COURT: I will say this to you. I will permit the witness to testify with the understanding that if you need time to protect yourself, I will accord it to you, and you are protected on the record.

I will not ask you for any agreement.

(End of Bench Conference.)

THE COURT: We will take a recess now.

(Whereupon a short recess was taken.)

(Jury returned to the Courtroom.)

THE COURT: You may resume the stand, Miss Mims.

BY MISS KENNEDY:

Q. Will you please state your name and your address? A. My name is Rosa Lee Mims. I live at 4425 New Hampshire Avenue, Northwest, Washington, D.C.

Q. And what is your occupation, Mrs. Mims? A. I am a licensed practical nurse for the Bureau of Public Health.

Q. Are you licensed in any other States to practice as a nurse? [112] A. Yes, three other states. Three States, I am sorry. The States of Maryland, Virginia and Washington.

Q. And how long have you been a nurse? A. I graduated in 1956.

Q. What is the name of the school? A. Margaret Murray Washington.

Q. Have you had occasions to work in hospitals as a nurse? A. Yes, I have.

Q. And how many different hospitals? A. Five.

Q. What are they? A. D. C. General Hospital, Washington Hospital Center, Children's Hospital, Georgetown Hospital and Holy Cross Hospital.

THE COURT: As what?

BY MISS KENNEDY:

Q. As what? A. At D.C. General Hospital they call practical nurses, nurse's assistants.

At Holy Cross, Children's and Washington Hospital Center, I was hired as a practical -- private duty nurse specializing on just one patient, private duty cases.

[113] Q. Now, during the past ten years that you have had the occasion -- that you have been a nurse, have you had the occasion to supervise the care of patients who were given oxygen? A. Yes.

Q. Approximately how many? A. Within ten years, I would say at least 100 patients.

Q. Now, are you able to state what are the usual routine precautions or what are the usual routine precautions that are taken regarding the safety of patients while they are in oxygen tents? A. Yes. Employees are instructed to always put a sign on the door entering the patient's room, no smoking, oxygen is being used or oxygen is in use.

All matches or anything that is inflammable are to be taken away from the patient and the patient's room.

THE COURT: Now, you have said two things. Which do you mean, please?

THE WITNESS: It depends upon the patient. Sometimes we have a patient that is sort of senile and you might have a problem with this particular patient, removing things from the bedside, then you are ordered not to leave anything inflammable in that patient's room.

[114] THE COURT: In other words, am I understanding you to say that you take it away from each of the patients; but if the patient be incapacitated, then you don't even leave it in the room?

THE WITNESS: If the patient is not understanding what we diagnose -- what the doctor's diagnose as being senile or confused, then this particular patient -- since it is your responsibility to see that --

THE COURT: Now you can't conclude.

THE WITNESS: This particular patient, you are not supposed to leave anything in reach of this patient that he might harm himself with.

THE COURT: All right.

BY MISS KENNEDY:

Q. Now, are patients ever left alone for long periods of time? A. No, patients that are in oxygen tents usually are pretty sick patients and they most times try to get someone to special these patients that

are in oxygen tents, but if enough employees are not available in order to have this patient specialed, whoever is working on the floor is supposed to check on this patient at regular intervals.

Q. How are patients usually dressed when they are placed in an oxygen tent? [115] A. Usually they just have a gown on unless it is a type of patient -- some of the private patients prefer their own clothing and you have the gown or pajamas or what have you.

Q. What is an oxygen tent like? Could you explain to the ladies and gentlemen of the jury just what it is? A. An oxygen tent is a tank and then it has a big plastic covering that goes over it -- fits over the patient and over the -- around the sides of the bed and you tuck it underneath the corner of the bed, under the mattress, to fit like over the patient.

Q. Where are the hands usually in the tent? A. The patient's hands?

Q. Yes. A. The patient's hands are inside of the tent.

* * *

[119] HELEN KELLEHER

was called to the witness stand on behalf of the plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS KENNEDY:

Q. Will you please state your name and your address? A. Helen --

THE COURT: Madam, would you speak louder, please? All these people have to hear you.

THE WITNESS: Helen Kelleher.

[120] BY MISS KENNEDY:

Q. And what is your address. A. 3200 16th Street, Northwest.

Q. Are you employed, Miss Kelleher? A. At Casualty Hospital.

Q. What is your position there at Casualty Hospital? A. Well, I

am in the business office of Casualty, financial records, accounts receivable.

Q. As a result -- A. Not completely, but many of these are mine.

Q. I beg your pardon? A. I said not completely, but many of these are mine. This happens to be mine.

Q. Thank you. Now, Miss Kelleher, as a result of a subpoena, did you bring certain financial records with you? A. I have the bills right here.

Q. Were these records kept in the regular course of business? A. They certainly were.

Q. Did you bring with you a financial statement showing bills incurred by Mr. Joseph S. Stansbury? A. Yes.

Q. From December 8, 1962 until February 5, 1965? [121] A. That's right.

THE COURT: February what?

MISS KENNEDY: December 8, 1962 until February 5, 1965.

THE COURT: Thank you.

BY MISS KENNEDY:

Q. Mrs. Kelleher, would you be good enough to tell us what is the total amount of that bill? A. Seven thousand four hundred and twenty dollars and fifty cents ($7420.50).

Q. Seven thousand four hundred and twenty dollars and fifty cents? A. That is all the admissions, the complete bill.

Q. Thank you. A. There were eight admissions.

MISS KENNEDY: Your witness.

CROSS EXAMINATION

BY MR. COLLINS:

Q. Did you prepare that bill at the request of plaintiff's attorney, Mrs. Stansbury's attorney? A. That is right. I prepared it from this. This is our original. It was prepared from this.

* * *

[122] THE COURT: Let me ask you, is there any question raised as to all these bills relating to the burns?

MR. COLLINS: No.

MISS KENNEDY: We will offer them in evidence.

THE COURT: You need not. There is no issue raised by Mr. Collins.

* * *

[126] DR. ENRIQUE GARCIA

was called to the witness stand on behalf of the plaintiff, being duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MISS HADEN:

Q. Would you state to the Court and to the jury your full name, doctor? A. Enrique Garcia.

Q. And where do you practice, doctor? A. I am not practicing. Right now I finished my residency, obstetrics and gynecology.

Q. And are you working at Casualty Hospital? A. Yes, part-time.

Q. Were you there in December of 1962, Doctor? A. Yes, I was

Q. And did you know a patient by the name of Joseph S. Stansbury? A. Yes, I did.

Q. When did you first see Mr. Stansbury? A. I believe it was the 10th of that month. I was called [127] for surgical consultation. I was Associate Resident at that time, and the Medical Resident called us for consultation.

Q. What was he suffering with when you were called for medical surgical consultation? A. This patient was admitted for a possible heart attack and suffered burns in his face, neck and arms and shoulders, I think.

Q. When did he suffer the burns of his arms and neck, shoulders, etc.? A. That date he suffered --

THE COURT: Excuse me, sir. You said he suffered burns on that date.

THE WITNESS: When he tried to light a cigarette and --

MISS HADEN: I did not ask that question. I asked him at what place was he when he suffered the burns?

THE WITNESS: He was in his room on the second floor.

BY MISS HADEN:

Q. What place? A. At Casualty Hospital.

Q. Was he in an oxygen tent at that time? A. Yes, when he suffered the burns.

Q. And the oxygen tent caught fire, do you know? [128] A. That is what I was told. I didn't see that.

Q. Are you familiar with oxygen tents? A. Yes.

Q. Would you describe for the jury what an oxygen tent is like? A. Well it is a plastic bag that is put on top of the bed and covers the bed and the patient in it with oxygen.

Q. And can it become a dangerous instrument? A. Yes.

Q. So what precautions do the persons, who are employed by the hospital, take in order that it not become a danger to the patient? A. The patient is instructed not to smoke or try to smoke and signs are put to prevent anybody to smoke.

Q. By anybody, would that mean personnel as well? A. Yes, everybody.

Q. Everybody? A. Yes.

Q. What was the first day that you saw Mr. Stansbury after the burns he had received in the oxygen tent? A. Mrs.?

Q. Mr. Joseph S. Stansbury. [129] A. I don't recall the time. This is the chart. I think it was the 10th of that month.

* * *

[131] Q. Doctor, during the time that Mr. Stansbury was in the hospital during his first admission, you saw him on various occasions, did you not? [132] A. Yes, I did.

Q. And you treated him on various occasions? A. Yes, I did under the direction of my Chief of Surgery.

THE COURT: Ladies and gentlemen, if you don't hear, make that fact known.

BY MISS HADEN:

Q. During these treatments, did you ever assist in the skin graft treatment of Mr. Stansbury? A. Yes, I did.

Q. Would you describe the skin graft treatments that you participated in, Doctor, to the jury? A. Well, I can describe generally. I can't describe each one. I don't remember.

Skin grafts to put a thin layer of skin from another part of the body and put in the place of the skin that is lost, and put stitches to keep it in position, and then dressings. That is a skin graft.

* * *

[134] Q. Did you make a diagnosis after the operation, doctor, that you just spoke of? A. Well, I wrote down the operation that was done.

Q. You made the pictures? A. I mean, I wrote -- put in letters what -- I described the operation.

Q. Would you read please to the jury what you wrote down yourself?

* * *

THE WITNESS: Under general anesthesia, the old retracted scar of the left neck was removed, and the place was covered with a skin graft taken from the left thigh. Done by Dr. Short.

* * *

[136] MISS KENNEDY: May it please the Court, the plaintiff rests with the exception that we would like to renew our motion to have the photographs admitted under Hudson v. Lazarus. We feel that it is almost impossible to fully create, through the testimony, the disabilities unless we can show that the burns -- what the burns were since unfortunately the original plaintiff is not before the Court.

THE COURT: I think that the record, as now constituted, clearly shows what the situation was through very competent doctors and what was done, seeking to correct that condition, and the fact that there is or was some limitation thereafter.

* * *

The cases cited by you were cases where a jury had for its consideration pain and suffering. Here we have pain and suffering specifically eliminated by statute and it being a discretionary matter, under the peculiar facts of the case, [137] I feel they are not admissible. I feel that the disabilities are clearly before the jury.

* * *

[138] (The jury was excused from the courtroom.)

MISS KENNEDY: If Your Honor please, may I have the cases back?

THE COURT: Oh, you certainly may. Thank you, Miss Kennedy. The plaintiff has now rested. You may proceed, Mr. Collins.

MR. COLLINS: Your Honor, on behalf of the defendant, Casualty Hospital, I make a motion for a directed verdict in its favor on those bases. There is no evidence in this case that the defendant did something that it should not have done, nor is there any evidence in this case that the defendant failed to do something that it should have done.

The evidence in the case establishes that Mr. Stansbury came to our hospital. He was brought by his son. His son waited for him outside.

After Mr. Stansbury was in the hospital for about twenty minutes, he walked out and told his son, who was waiting for him out there, that he was going to be kept at the hospital and there was no need for his son to wait for him.

He was then admitted. We know also from the evidence that he was placed in an oxygen tent.

[139] We know also from the evidence that about three hours later, he received some burns, either in or around the oxygen tent.

There really is no evidence as to the cause of the accident but for what the plaintiff has given us, that being the hospital records and there are some indications in the hospital records as to how the accident happened, and Dr. Garcia testified as to how the accident happened.

Therefore, Your Honor, I think there is no evidence of negligence, and I certainly don't think that the doctrine of res ipsa loquitor applies because the doctrine requires three things, and one, the cause of the accident must be known, and it must be within the exclusive control of the defendant, and it must be the type of accident that doesn't usually happen on negligence.

The cause here was fire, presumably, coming from on around an oxygen tent, and the exclusive control of the oxygen tent was certainly not on the defendant, and moreover, it is the burden of the plaintiff to exclude all other possible causes, and thirdly, I think that -- generally speaking, fire is a type of thing that can occur with or without negligence.

I don't think the doctrine should apply to that aspect of it. I don't think it was established that the [140] defendant had exclusive control of that device, and for these reasons we make our motion.

THE COURT: Mrs. Kennedy.

MISS KENNEDY: May it please the Court, as Your Honor well knows, and it was well held in Levy v. D. C. Transit, 174 Atlantic 2d, 731, a plaintiff may rely on --

THE COURT: Let me say that I agree with you and our Court of Appeals has said so too.

I think that you have a perfect right to rely on both specific negligence and the doctrine of res ipsa and so you need not argue that.

If there is anything to the contrary, we will hear about that from the other side.

MISS KENNEDY: I think that Mr. Collins spoke something about contributory negligence there and, of course, negligence and contributory negligence are questions of fact to be decided by the jury, and, of

course, we have any number of cases on that.

Now with respect to even, I think, Mr. Collins' opening statement, he says that they were prepared to prove that the decedent lighted a cigarette, and that this caused the explosion.

I certainly feel, and I am sure Your Honor agrees, [141] that in the law of negligence, there are acts of omission as well as acts of commission.

Now the fact is, and I think we showed through the nurse who testified there, that the oxygen tent -- because I asked her specifically who supervises and controls the oxygen tent? She said the nurse. I think she said there was some Miss Kin there which means this oxygen tent was under the exclusive control of a hospital, and most certainly a patient is not required to operate it.

I think the very fact that this man went there, was placed in a wheel chair, or what have you, and put in a bed, according to the records, with side rails, covered with an oxygen tent, and then left unattended apparently, and assuming that Your Honor or the jury would believe that there was a lighted cigarette. I think negligence could be found from that fact alone, that there was an omission of a duty.

I think the very fact that this thing happened, and he went there for a heart treatment, and came out or ended up being a flaming torch, and now I don't think it is necessary to prove any specific acts of negligence. However, if, as I say, that their defense is contributory negligence, that is an affirmative defense, and I think that the plaintiff --

THE COURT: Let me say, Miss Kennedy, that --

[142] MISS KENNEDY: -- made out a prima facie case and it is incumbent on them to go forward to rebut this.

THE COURT: I am not considering at this juncture contributory negligence. This is a question of whether you have shown negligence by either of two theories, one, specific negligence on the part of the defendant, or you have shown facts of sufficient character to permit the

application of the doctrine of res ipsa. Now you say specifically the negligence is what? What do you say your testimony shows as to specific acts of negligence or a combination of commission and omission?

MISS KENNEDY: Our testimony? The nurse who took the stand.

THE COURT: What did she say?

MISS KENNEDY: Mrs. Emert said that she was a night supervisor at that time; and that Mr. Stansbury was in the oxygen tent. I asked her whether or not there was a nurse in attendance. She said there was a nurse in attendance. I asked her who controlled and supervised the oxygen tent, and she said that that was the duty of the nurse.

She did not attempt to explain how the fire started. She said she really didn't know. She saw a package of cigarettes on the bed, and she didn't know who put them there.

[143] So I certainly think, and the cases so hold, and I have any number of them here, Your Honor, that I submitted to Your Honor, and on the res ipsa loquitor question alone.

In Foster v. Delgrave -- this is a California case, Your Honor, but the patient was burned by a heating pad, res ipsa loquitor, hospital liability.

The plaintiff was a patient in the defendant's private hospital where she was undergoing treatment for an infected toe. Plaintiff sustained a second degree burn on her leg as a result of treatment with a heating pad, and action for damages for personal injuries resulted in a judgment for defendant.

On appeal, the plaintiff contended that the lower Court erred in refusing to instruct the jury on the doctrine of res ipsa loquitor.

This Court held that the doctrine was applicable, that the lower Court erred in refusing to instruct the jury on that doctrine. Judgment was reversed.

In Lustine-Nicholson Motor Company v. Petzal, and this is United States Court of Appeals for the District of Columbia, No. 14,908, the

customer was hit by overhead door, res ipsa loquitor, garage owners liability.

The plaintiff brought this action against the [144] defendant garage owner for damages for personal injuries which he sustained when his head was struck by a large electrically activiated overhead door.

The Trial Court entered judgment on a verdict for plaintiff and defendant appealed. The Court held it was proper for the Trial Court to give instructions on res ipsa loquitor.

The defendant attempted, by expert testimony, to show that res ipsa loquitor was inapplicable because the door could not fall unless it was forced down or activated by one of two switches, neither of which were pushed.

The plaintiff, although he did not try to explain how the door fell, testified that the door did fall on his head.

The evidence was conflicting and the jury could properly have disbelieved one of the defendant's witnesses and then have applied the res ipsa loquitor inference to explain the plaintiff's testimony.

Of course, that was affirmed there, because the Judge did give the instruction.

We have another case here, and this came down from the New York Court of Appeals, Cadicamo v. Long Island College Hospital, New York Appeals, December, 1954 Child Burned to Death, Hospital's liability.

[145] Plaintiff decedent, a newborn child, suffered fatal injuries with a heating lamp which was placed too close to the child's blanket by nurse.

The Appellate Division held in an action for damages that a wrongful death, the act of the nurse was a professional or medical act as distinguished from an administrative act which the hospital would be liable.

The judgment of the Supreme Court directing a verdict for the defendant on a motion after verdict for the plaintiff was affirmed.

In appeal this Court held that active nursing of the children are required when unguarded gooseneck lamps are used as heating devices.

The withdrawal of the nurse from the nursery for the purpose of returning feeding bottles to the basement of the hospital constituted an administrative duty which caused fire and its fatal consequences.

The jury was warranted in finding a verdict for the plaintiff and judgments were reversed.

We have one, of course, from the Georgia Court of Appeals, Howell v. the Executive Committee of the Baptist Convention, Georgia Court of Appeals, No. 36,568, April 2, 1957, Hospital Patient suffered, burned during surgery, hospital's liability.

[146] The plaintiff's petitioner alleges that he was burned on the back while anesthetized for surgery and his neck -- anesthetized for surgery on his neck, and while under the defendant's complete control. Stated a cause of action.

THE COURT: Miss Kennedy --

MISS KENNEDY: The complaint dismissing the action was reversed.

In Frost v. Des Moines Still College of Osteopathy and Surgery, and this is the Iowa Supreme Court, Anesthetized patient burned, res ipsa loquitor, hospital's liability, and in this case presumably there was an explosion of a volatile inflammable antiseptic which was applied in too great amount to plaintiff's back and which stuck to the sheet on which plaintiff was placed.

On appeal this Court held that the doctrine of res ipsa loquitor was applicable and that a finding was warranted, that hospital employees were negligent in performing the administrative task of preparing the plaintiff for operation.

Defendant's hospital's evidence was, as a matter of law, insufficient to show that it did not control its servants because they were loaned to another.

That case held that the defendant corporation must answer for the negligence of its servants, agents and employees [147] and that the defendant corporation had complete control and I think that that is evident here, that they had complete control over its officers and employees -- and -- will the Court indulge me for a moment?

THE COURT: Yes.

MISS KENNEDY: In Cox v. Episcopal Eye, Ear and Throat Hospital, District of Columbia Municipal Court of Appeals, No. 2,008, July 18, 1957, Appeal from Municipal Court for the District of Columbia reversed, malpractice-sufficiency of complaint.

In Christie v. Callahan, 75 U.S. App. D.C. 133, 124 F2d, 825, and that is a D.C. case.

The law does not require every fact and circumstances going to make up a case of negligence or proximate cause to be proved by eye witnesses or positive direct testimony.

I think, if Your Honor please, there was a clear inference here which a jury might very well infer, the fact that this oxygen tent was under the direct control of the hospital, and that this man went there, according to his deposition, without a scar on his body, and that subsequently he was placed in this tent, and when he recovered five or six weeks later, that had all of these burns about his body, and that shows there was an omission of a duty which I think [148] a jury might very well infer.

Under res ipsa loquitor --

THE COURT: I can't let you leave that. The mere fact that the man suffered injuries, that doesn't make for any liability. You have preliminary steps to reach those.

In other words, before you get to the matter of actual injuries, you have to show the cause and that that was the proximate cause of the injuries. I don't think anyone would challenge that. This gentleman did sustain severe injuries, and the question we have is whether there is a showing of negligence, either a specific showing or under res ipsa,

recognizing as we must, that you may travel both routes, but having travelled those routes, whether you have shown sufficient to make for a prima facie case as to specific negligence or shown factual background and data sufficient to permit the application of the doctrine.

MISS KENNEDY: Under the theory of res ipsa loquitor, the thing speaks for itself. I think we have given the proper background this way.

Number one, the defendant did go to the hospital, that is not rebutted. He was admitted as a heart patient. He was not burned at the time.

THE COURT: He was not what?

[149] MISS KENNEDY: Not burned.

The defendant has admitted the fire, that it did happen. They have sought in their opening statement to say that it was probably contributory negligence or that he lighted a match. That is what the defendant did say, but they have admitted that there was a fire after he was placed in the oxygen tent.

The nurse has admitted, and, of course, we are certainly more at a disadvantage than any other patient would be, the plaintiff would be, because the very persons from whom we seek to recover were the persons that committed the act. There is no other way that you can get any other witnesses. How could you even recover?

We have, number one, established that the man was admitted, and there was not a burn on his body, that he was subsequently placed in an oxygen tent, and that this oxygen tent exploded.

They admitted that and that there was the fire and that he was burned, and the nurse has said, because we asked her, specifically under whose control and management was the oxygen tent, and she said the nurse on duty.

Now certainly under the doctrine of res ipsa loquitor the thing speaks for itself, we have made out a prima facie [150] case that certainly puts the burden on the defendant to go forward to show that there was no negligence on their part because I think that the negligence is

inferred and under the doctrine of res ipsa loquitor, you don't have to know how a thing happens.

There can be an inference of negligence. A rebuttable presumption that the defendant was negligent, which arises upon proof that the instrumentality causing the injury was in the defendant's control and that the accident was one which ordinarily does not happen in the absence of negligence.

Now we also had a person take the stand who had been a nurse for ten years and she had worked in, at least, five different hospitals.

We asked her what precautions are usually taken when a person is placed in an oxygen tent, and she says the matches and cigarettes are taken from the possession and out of the reach. I think that the nurse said, and she was very truthful insofar as that was concerned, yes, she said, she was in charge. She said -- I asked what precautions and I asked were there any signs up and she said I don't remember any signs being up. She was the head nurse at that time. She has been there for some twenty years. She said the signs should have been placed up, but she couldn't recall whether [151] there was a sign. She said they usually go up with the oxygen tent, but most certainly under even a theory of negligence, if they didn't put the signs up, then there is an omission of a duty there that is a specific act of negligence.

THE COURT: Does the record here indicate that this gentleman was asked to give up the matches?

MISS KENNEDY: You say was there any evidence that this gentleman was asked to give the matches?

THE COURT: Yes.

MISS KENNEDY: The record which has been admitted into evidence, over objection, talks about him having --

THE COURT: No. I am not asking you that.

MISS KENNEDY: That is another point I want to make.

THE COURT: You go ahead. Suppose you finish.

MISS KENNEDY: This record here and also which has been admitted and agreed upon, stipulated, that it may be introduced into evidence says that the fire was caused when the patient tried to light a cigarette under the oxygen tent. That is right there. Shall I show it to Your Honor?

THE COURT: No, I will take your word for it.

MISS KENNEDY: So then that is an inference.

THE COURT: Let's assume that. What benefit do you get from that?

[152] MISS KENNEDY: All right. I think that inasmuch as the records are in evidence, that certainly it is a question of fact for the jury, whether or not there was an omission of a duty. Negligence isn't some specific act. I mean, negligence isn't some specific act they did wrong. It may be an omission of a duty which they didn't perform.

Does Your Honor agree with that?

THE COURT: Yes, indeed.

MISS KENNEDY: Very well, Your Honor.

So, therefore, I say that the very fact that their records show -- they seek to explain in their records, which have been admitted into evidence, that this man -- the fire was caused by him lighting a cigarette, and I think the jury could very well infer from that that there was an omission of a duty.

THE COURT: All right. Now, have you evidence that they were not taken away from him or that they knew or should have known that he had cigarettes?

MISS KENNEDY: Do I have evidence?

THE COURT: I mean, does the case show that?

MISS KENNEDY: We have evidence that there was a fire and if they, as they say, that he was lighting a cigarette, the thing speaks for itself. They apparently didn't take it [153] away from him if that started the fire and that is what caused the explosion.

THE COURT: Now this is a gentleman who is mobile, he is competent and he is not an infant. Do you, Miss Kennedy, recognize any difference under those circumstances?

MISS KENNEDY: If Your Honor please, I think that is a question of fact. The evidence shows, from his deposition, that shortly after he was admitted to the hospital, he blacked out. That is a question of fact. That is a question of credibility if the jury would be inclined to believe any of his testimony, and they would have a right to unless it would be rebutted by defense counsel.

* * *

[155] So, Your Honor, he says as soon as he was examined, he walked into this door and he blacked out. And so I believe that answers that and in several other places he says the same thing and he maintained that all the way through, and of course, that is a question of credibility and the jury may very well believe that he passed out, and apparently he did, because they put him in an oxygen tent with side rails.

THE COURT: Now, if you are through, Mrs. Kennedy, will you state specifically what you deem to be the specific negligence as shown here?

MISS KENNEDY: The specific negligence, if Your Honor, please, relying on what counsel said in his opening statement --

THE COURT: No ma'am. Opening statements of counsel are not evidence, and I can't deal with that. I want to say to you, by the way of premise, that on a motion for a directed [156] verdict, as I understand the law, I must construe the evidence that you have offered in the light most favorable to you and also indulging in all reasonable inferences which are favorable to you. That is our premise. You may proceed from that premise.

I may have confused you. I want you to get the whole picture. You started talking about contributory negligence. Of course, if in the plaintiff's case contributory negligence be shown as a matter of law, then, of course, that is something to be considered.

MISS KENNEDY: Yes.

THE COURT: All right. I thought that might be helpful to you.

MISS KENNEDY: Yes, Your Honor. Or specific acts of neglience, if Your Honor please, would arise from the omission of a duty.

THE COURT: To do what now?

MISS KENNEDY: To see that Mr. Stansbury, who was admitted to the hospital, was taken care of, and that he would not -- will the Court indulge me, please?

THE COURT: Yes.

MISS KENNEDY: All right. As I said it would arise from the omission of a duty owing Mr. Stansbury. We say [157] that there was a duty to keep close watch on this patient in the condition that he was, and where he could not help himself after placing him in this potentially dangerous instrumentality, which the defendant hospital knew to be potentially dangerous or should have known in their business.

The failure to keep this close watch on him, and letting him to become burned as a result of this omission, constitutes negligence.

THE COURT: Do you have anything further?

MISS KENNEDY: Yes, if Your Honor please, we also, from the records, which have been admitted into evidence without objection and stipulated to, there is an indication that the plaintiff, from the notes, attempted to light a cigarette.

We feel that they omitted a duty which they were called upon to do, and to see that there were no inflammable objects, or matches or anything near or about a patient in such a dangerous instrumentality as an oxygen tent.

We think the failure to do that was an omission of a duty.

Now, with respect to the alternative doctrine --

THE COURT: Now before you leave that, what is the evidence which supports your two specific allegations of omission?

[158] MISS KENNEDY: Of omissions, the record which says that he attempted, which has already been introduced into evidence, he at-

tempted to light a cigarette while in an oxygen tent, and number two, Mrs. Emert, the nurse, who testified that she did not know whether there were any no smoking signs posted around the tent or not.

THE COURT: Now, is that the duty of her to show that?

MISS KENNEDY: Well, she was the supervisor.

THE COURT: My recollection is that she said she didn't know whether there were any there or not. She didn't look. She had more important things to do.

MISS KENNEDY: That is right. She was the night supervisor in charge and if she had more important things to do, knowing a man was helpless there, and blacked out in an oxygen tent --

THE COURT: She came on the scene, as I recall from this record, only after the accident had occurred. Isn't that right?

MISS KENNEDY: Well, if Your Honor please, she came -- no. I think she said she was the night supervisor and that she saw the bed and everything after it was burned. She also said she saw a package of cigarettes on the bed.

[159] THE COURT: You are talking about different things at the moment. I want to understand from you whether or not there is any evidence that there were no signs there as distinguished from a person saying she did not know whether there were or not. Do I make the distinction clear to you?

MISS KENNEDY: Well, Your Honor, you see, you are asking me to prove the negative.

THE COURT: I am not asking you to prove anything. I am trying to get what you have.

MISS KENNEDY: We got the testimony that the night supervisor, who was in charge, said she didn't recall whether or not there were any signs, no smoking signs, and we got the record and we also have her testimony saying that there was a package of cigarettes on the bed, and then we got the record saying that the decedent attempted to light a cigarette while in the oxygen tent, and also I think Dr. Garcia, and it

wasn't responsive, but he said that before the jury this morning, that this fire happened while the defendant was attempting to light a cigarette.

There are three things there.

THE COURT: If you treat that as evidence, wouldn't that make for the contributory negligence as a matter of law, namely, that this man attempted to light a cigarette?

[160] MISS KENNEDY: Well, contributory negligence, if Your Honor pleases, is an affirmative defense.

THE COURT: Well, it can come in through the plaintiff's case as well as through the defendant's case. It doesn't make any difference whose evidence it is.

MISS KENNEDY: But it is not my providence. I think it is the jury's providence to decide and if they decide it was contributory negligence, then, of course, the plaintiff could not recover and they might do that, but I think they should be given an opportunity to see whether or not from the facts, there is any inference of negligence here or an omission of a duty on the hospital's part.

I think if we decided this as a matter of law, that it would be taken -- these questions of fact and there are many questions of fact here and --

THE COURT: Did you -- All right, go ahead.

MISS KENNEDY: Your Honor, I certainly think that this case, if not controlled by specific acts of negligence, the doctrine of --

THE COURT: I missed what you said.

MISS KENNEDY: I have now left that and have gone to the doctrine of res ipsa loquitor which I think is applicable and which I have already cited the cases we have.

[161] THE COURT: You certainly have and you furnished them to me and for that I thank you. I have read those cases.

Now, I am asking you now whether under those cases and the facts here, where is the exclusive control and dominion over that?

MISS KENNEDY: I think, Your Honor, that you can even take judicial notice that a hospital has exclusive control and dominion over its oxygen tent, and we also had testimony from the nurse that this oxygen tent was under the supervision and control because I even asked was it customary when you place people in tents to leave them there for long periods of time, and she said, no, they would check them and depending upon the condition of the patient.

The patient certainly doesn't operate oxygen tents. They are always under the exclusive control of the hospital, which, I believe, Your Honor, assuming that we didn't even have the testimony, there is an inference of negligence there, and under that doctrine, you do not have to point out specifically what caused this fire, whether it is a cigarette or a match or what have you, but the fact that it happened in this thing, and it was being controlled by the hospital.

THE COURT: I think one of the ingredients of res ipsa is that the cause is known and that it is under the [162] exclusive control, and in the normal happening of events the act would not have occurred.

MISS KENNEDY: That's right.

THE COURT: So we do have those three ingredients.

MISS KENNEDY: I beg your pardon?

THE COURT: We do have to have those three ingredients shown before we can apply that.

MISS KENNEDY: Res ipsa loquitor, that it did happen, and that but for an inference of negligence, it would not have happened, and, of course, the cause not specifically known.

Now what caused it, we still don't know. We didn't say that it was caused by that. The defendant has said it was caused by a lighted match. That is a question of fact. We don't know what caused the explosion.

I think they are going to tender here a mechanic to say something about the last time he inspected it, and nobody can prove what caused this explosion as such. We know that it happened.

THE COURT: Have you anything further that you would like to say, Mrs. Kennedy?

MISS KENNEDY: Well, Your Honor, I don't know. I guess I have said just about all that I have.

[163] THE COURT: I just wanted to accord you the opportunity.

MISS KENNEDY: Well, of course, if Your Honor has already made up your mind --

THE COURT: I don't think that you understood what I said.

MISS KENNEDY: No.

THE COURT: I didn't indicate that at all, and I haven't. I wouldn't be listening to you, as I am, if I had so concluded.

All that I am desirous of doing is to accord you an opportunity to present anything that you have in addition to that which you have presented, and that is all.

MISS KENNEDY: Your Honor, will you give me a five minute recess?

THE COURT: We will take that and give the reporter a chance too and then we will hear what else you have to say plus what Mr. Collins might have to say.

(Whereupon a short recess was taken.)

THE COURT: When you are ready, Mrs. Kennedy, you may proceed.

MISS KENNEDY: Well, if Your Honor please, I think that we have talked about the fact that Casualty Hospital owed a duty to the decedent, and there was a breach of that [164] duty, and as a result he was damaged.

Now, Mr. Stansbury was under the exclusive control of Casualty Hospital. The doctors' testimony admitted that they had taken care of him. The records showed medical care that was ordered for him and to place him in the oxygen tent, and we put I think, three doctors on the stand.

Each one of them testified to the same thing, and that this man was burned while in this oxygen tent.

Now, we say that Mr. Stansbury was under the exclusive control of the hospital which had exclusive control over its personnel and over, of course, the oxygen tent which is a dangerous instrumentality.

Now, I think that negligence, under the doctrine of res ipsa may be inferred from a thing, as Your Honor said, ordinarily would not have happened, but for some negligent act or some omission of a duty.

We feel that those inferences might be cited or some of the inferences there, in that there was a failure to keep close watch over the patient when he was in a helpless condition, and, of course, we read his deposition, his testimony to the ladies and gentlemen of the jury, and they might very well believe the things that he said.

He claimed that just after being admitted, he blacked [165] out, and he didn't remember anything else.

We have a case that says the law makes no distinction between direct and indirect evidence as to the degree of proof required to support a finding of fact. Negligence and proximate cause may be proved by indirect evidence.

American v. Manhattan --

THE COURT: You need not go any further. We even use that in criminal cases, that the highest degree of proof is required. I agree with you on that. On the other hand, of course, they must be gleaned from proven facts.

MISS KENNEDY: Under all of the evidence in the case, and I think that from what we have said or presented, the jury might very well feel that the defendant did not exercise ordinary precautions demanded of it, and particularly in view of the condition, as we stated.

We respectfully submit, if Your Honor please, that the defendant's motion for a directed verdict should be denied.

THE COURT: Mr. Collins, the last thing that Mrs. Kennedy mentioned, namely, the testimony to the effect that this man had blacked

out anticipatory of the situation, is a matter which gives me real concern.

MR. COLLINS: Very well, Your Honor. If I may, as a preamble to that, Your Honor --

[166] THE COURT: You do it as you see fit. I am just calling your attention to it.

MR. COLLINS: She mentioned three things, and one, that we had a duty to keep a close watch. There is no evidence that we didn't.

Secondly, she said that if the plaintiff had lighted a cigarette, which seems to be the case, that we had a duty to take them away from him, but there is no evidence that we didn't attempt to fulfill that duty, no evidence that we didn't advise him of that.

THE COURT: Before you leave that, there is a circumstance there isn't there, a finding of a cigarette afterwards?

MR. COLLINS: Yes, Your Honor, but I think that the fact that a cigarette may have been found with the man afterwards, doesn't necessarily mean that the defendant didn't take to exercise his duty. I think they have to show that the defendant didn't ask him if he had cigarettes and didn't try to take them away from him, and didn't advise that he wasn't to smoke. Here again it would be the fact that an accident happened.

I think they have to come forward and show that we didn't do something.

[167] Now, with respect to the res ipsa loquitor, I believe she says there are two causes of this accident, and one, was that the plaintiff -- the decedent himself lighted a cigarette, and that was the cause of the accident.

I do not think, Your Honor, that he is within the exclusive control of the hospital.

Secondly, she says that we don't know the cause of the accident.

If I may, Your Honor, in that regard, the law in this jurisdiction with respect to res ipsa loquitor, has long been set, and I am sure

Your Honor is familiar with the case of Brown v. Capital Transit Company, decided in 1942 at 75 U.S. App. D.C., 337. That, of course, involved an accident occurring to a lady as she got off a streetcar, but suffice it to say, that the Court in affirming the direction of a verdict and excluding the doctrine of res ipsa loquitor, stated whereas here, it is a matter of surmise that the damage was due to a cause for which the defendant is liable. The doctrine is inapplicable.

THE COURT: Say that again.

MR. COLLINS: Whereas here, it is a matter of surmise that the damage was due to a cause for which the defendant is liable. The doctrine is inapplicable. If causes [168] other than the negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence, and Your Honor, subsequently, in Taylor v. Crane Rental, at 103 U.S. App. D.C., 13, which was a case involving an accident that occurred to -- with a dropping of a steel beam.

The Court again said, it was -- there again it was a direction of a directed verdict, which was affirmed. It was Appellant's, that is the plaintiff's, burden to exclude the operation of such causes, those causes being the causes outside of the defendant's control, causes for which the defendant would not be liable.

Now here again we have -- we have a situation that fire is always a problem. It can occur with or without negligence. We have a situation where a fire caused an injury.

I think the fair preponderance of the evidence in the case is predicated upon the hospital records probably and that is, that the fire occurred with a man lighting a cigarette.

We don't have -- we can't control that man. We may undertake to exercise control but even though we may attempt to exercise that control, he is a human being who has free will and everything else. We can't -- it is -- we can't [169] exercise it absolutely, if Your Honor, please.

Now, Your Honor, mentioned that the man said he blacked out. If I may say so, Your Honor, the man testified rather that he came to the hospital and he doesn't recall anything from the time he went in until five or six weeks later.

The only evidence with respect to his condition comes to us from the plaintiff's witnesses and first, his son, whom we know loves him and obviously does not think his condition is -- obviously doesn't think his father is incoherent or he would not have permitted his father to go in unattended, and obviously doesn't think his father is in such poor shape as to require a little love and attention from him and then the father comes out and says you may go home. There is no need for you to stay.

The nurse testified that he was alert and coherent, and merely because a many says I don't remember --

THE COURT: Now, please call my attention, Mr. Collins, to the specific language.

MR. COLLINS: He says, Your Honor, on page 12, at the bottom of the page, in answer to a question:

"Q. When you went into the door of Casualty Hospital, where did you go then? [170] "A. Well, the lady at the desk right inside, as I walked in, she called the doctor and he examined me. After that I must have blacked out. I don't know anything else.

"Q. You don't remember anything else? "A. I don't remember nothing else.

"Q. And this is after the doctor examined you? "A. That's right.

"Q. What is the next thing you remember? "A. I guess about five or six weeks afterwards, then I realized that I was burned."

THE COURT: It would seem to me that that is sufficient for that particular feature to go to the jury.

MR. COLLINS: I beg your pardon.

THE COURT: It would seem to me that that language employed here is such that it is susceptible to the fact that after the examination

he did in fact black out, and recalling or remembering something only after the interval of five or six weeks. I think that would be a jury question.

MR. COLLINS: Very well, Your Honor, but the fact of the matter is still that the plaintiff in this case, and we don't -- our duty is not absolute. Our duty is one of ordinary care.

THE COURT: You are not an insurer.

[171] MR. COLLINS: That is right. I don't think there is any evidence of any specific negligence here. The question is, is there a sufficient basis to send the case to the jury on the doctrine of res ipsa loquitor. The question there is that -- the law is that the cause of the accident must be within the exclusive control of the one that is trying to charge.

THE COURT: I will hold with you on res ipsa. I will grant your motion as to a directed verdict on that, and I will deny it as to a specific negligence in the light of this man's condition as of the time.

MR. COLLINS: Your Honor, may I ask you a question?

THE COURT: Yes.

MR. COLLINS: With respect to our failure to keep a close watch on him, I honestly can't see --

THE COURT: Let me say this to you. My feeling on the record as it now stands is that there isn't any showing of any standing which could be applied as to whether there was or was not a proper watch kept but I am relating specifically my denial to the fact that there is evidence to the effect that after the examination, and anticipatory to the fire, it shows that this man, for a period of time, did have a black out or sufficient for the jury to say that he did.

[172] If he did have a black out, then what is the duty on the hospital under those circumstances where you have added to that the circumstance later found of cigarettes being in a close position to him.

MR. COLLINS: Your Honor, is it my burden to establish what our duty is?

THE COURT: No, sir.

MR. COLLINS: Isn't it the plaintiff's burden to prove that or prove that we have not met it?

THE COURT: I think that is true, but we are at the point now as to a directed verdict where I must treat it as true and give every reasonable inference to it.

If it be believed by the jury, that this man did black out, and if they believe that the cigarettes were found in his bed, did they under all of the circumstances, including the black out, take reasonable steps for the protection of the man?

I grant you that if it were not for the fact that he had blacked out, I don't think that you have any more duty than to say to an adult, a coherent person, you give us your cigarettes. You are not to have any matches. I don't think you have a right to a shakedown and search and seizure, but under these circumstances, I do think it is a question for the [173] jury whether under all the facts and circumstances your principal did exercise reasonable care.

MR. COLLINS: Very well, Your Honor.

THE COURT: Are you ready to go forward at this time, Mr. Collins?

MR. COLLINS: Yes. I understand Your Honor says that this will be a question for the jury as of this time?

THE COURT: That's right. I can't anticipate what will transpire. I am saying to you now that I am directing a verdict insofar as the theory of res ipsa is concerned, but not as to the question of whether or not there be negligence.

Bring in the jury please.

(Whereupon the jury was brought into the courtroom.)

THE COURT: You may proceed, Mr. Collins.

MR. COLLINS: Call Robert Stewart, please.

ROBERT FRANKLIN STEWART

was called to the witness stand on behalf of the defendant, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

Q. Mr. Stewart will you speak up and try to talk to me and then I think we will all be able to hear you.

Would you state your full name, please? [174] A. Robert Franklin Stewart.

Q. Where do you live, Mr. Stewart? A. I live at 5055 Hayes Street, Southeast.

Q. Are you employed? A. Yes, I am.

Q. By whom? A. Casualty Hospital.

Q. How long have you been there? A. Seventeen years.

Q. Mr. Stewart, I take it then you were employed at Casualty Hospital during the month of December of 1962? A. Yes.

Q. I direct your attention to December 8, 1962, when a gentleman by the name of Mr. Stansbury was admitted to the hospital. Did you ever meet Mr. Stansbury? A. No, I haven't.

Q. All right, do you recall a situation at the hospital where there was a fire in a patient's room? A. I was called from the first floor to come to the second floor east. They have the fire bell --

Q. You will have to speak up. A. I was called to the second floor east during the fire.

[175] Q. Had you been to that room before that day? A. No, I haven't.

Q. Had you seen -- did you see the man? A. Pardon me. You mean the day before when he came into the hospital, admitted to the hospital?

Q. Yes. A. I was there that night to put the oxygen tent up.

Q. You had put the oxygen tent up? A. On the patient himself be-

cause I am the one that takes care of putting oxygen tents up during the nights.

THE COURT: Mr. Collins, excuse me. It may be clear to you, but I would like to have it clear as far as I am concerned.

When you put the oxygen tent up, did you see the patient then, sir?

THE WITNESS: I seen the patient then, sir.

BY MR. COLLINS:

Q. And where was -- where was he when you first saw him? A. Well, when they were calling to me to bring the oxygen tent to the second floor to put up for this patient, then which orderly it was that brought the patient up to the room, that's when I seen the patient.

[176] Q. Now, how was the patient dressed when you first saw him? A. Well, if I can recall that time, he had on a shirt. Just a shirt He had taken his pants off. He had his pants on his lap.

Q. Did he go on and get undressed? A. No, I helped him to get undressed myself because he looked like he was a little weak. I helped him and after I was helping him, I asked him did he have any matches.

MISS KENNEDY: Your Honor, this is not responsive to the question.

THE COURT: All right.

BY MR. COLLINS:

Q. As you helped him, did you and he have a conversation? A. Yes.

Q. What conversation did you have? A. Well I asked him was he feeling bad, and he said he was sick.

THE COURT: Excuse me, Mr. Witness, you will have to speak up. That airconditioning makes a lot of racket. You said something which I did not hear. What did you say, sir?

THE WITNESS: I just asked him did he have any matches on him or anything.

[177] BY MR. COLLINS:

Q. What did he say? A. And also I said cigarettes, and he said

no he didn't have anything.

Q. What happened to his clothing? Where did it go? A. After I had taken his clothing off, the nurse was standing there and I gave them to the nurse because the nurses have to check them on the slip, and so I gave them to the nurse.

Q. All right. Now, in this room where you put up the oxygen tent, where is the oxygen coming from? A. It's a wall oxygen piped into the oxygen. It comes from the wall.

Q. Right out of the wall? A. Through the wall right beside the bed, up over the bed.

Q. When the man got in bed, did you put the oxygen tent on him? A. I put the oxygen -- put the oxygen and covered him with it and I usually put a cheesecloth --

Q. I did not hear you. A. I put the oxygen tent over him.

Q. Can you describe the tent for us? [178] A. Well, the tent is heavy canvas, and made on a rack that comes over and down each side of the bed and tuck underneath the mattress and you put a cheesecloth over -- no a sheet over the bottom of it.

Q. Does it have any signs on it? A. It had a sign on it that said no smoking, a red sign.

Q. Did you and this gentleman have a talk about smoking? A. Well, I talked to him. I told him, I said, you are not allowed to smoke.

MISS KENNEDY: I object.

THE WITNESS: Not allowed to smoke and --

MR. COLLINS: Wait a minute.

MISS KENNEDY: If Your Honor please, I would rather he not lead the witness, and this is not responsive.

THE COURT: He asked if he had any talks with reference to smoking. I think that is a proper question.

Mr. Witness, what conversation did you have with him?

THE WITNESS: I didn't have no conversation at all, except the smoking.

THE COURT: What did you say with reference to that?

[179] THE WITNESS: After that I didn't say anything. I went on and put him in the bed.

THE COURT: Did you say anything to him about whether he should or should not smoke?

THE WITNESS: Well I told him that as I was putting him in bed.

THE COURT: What was that that you told him?

THE WITNESS: I told him that he wasn't supposed to smoke while he was in the oxygen tent and as long as the oxygen tent was in the room.

BY MR. COLLINS:

Q. Now, you mentioned to us that he told you he wasn't feeling well. Did he act like he didn't understand you? A. No, he didn't act like he didn't understand me, because he said, well, he knows that he wasn't allowed to smoke because he had been in the hospital before and which hospital it was, I don't know.

Q. All right, now, you mentioned that -- then after that was arranged, did you leave him? A. Yes, I left.

Q. Were there any nurses or nurses aids around? A. The nurse was still in there checking his clothes.

[180] Q. Did you see that gentleman after that? A. No, I didn't see him until after that night, but on Saturday night when I seen him again is when we got a call to the second floor east about the fire.

Q. About a fire? A. Yes.

Q. And then is that where you went, to that same room? A. I went to that same room to help him -- get him out of there.

Q. What was done when you say help to get him out of there? How was that done? A. What was done?

Q. What was done when you went up there? A. We pulled the bed and all from the room 226 to another room opposite from there.

Q. Did you talk to him? A. We left him in the bed and pulled it in another room and the doctors and all came up.

Q. Did you talk with him at all at that time? A. No, I didn't talk to him at all.

Q. Did you see him after that? A. No, I have not seen him since that day.

MR. COLLINS: No further questions.

[181] THE COURT: Mrs. Kennedy?

MR. COLLINS: Oh, one more question, Your Honor.

BY MR. COLLINS:

Q. You mentioned there was a sign on the oxygen tent. Were there any other signs in or about there? A. We have some that we put on the outside of the door.

Q. Was there a sign there? A. Yes, there was.

MR. COLLINS: That is all.

CROSS EXAMINATION

BY MISS KENNEDY:

Q. Mr. Stewart, did you put the sign on the door yourself? A. Yes, I did.

Q. When did you put it up, before or after you left? A. After I came out. I usually put it up after I come out, on my way out, I put the sign on the door.

Q. But was Mr. Stansbury in the bed before or after you put the sign on the door? A. What? The patient?

Q. Yes. A. Was in the bed. He was in the bed because I had to put him in the oxygen tent and get the thing started because he looked like he was very weak, shortening of breath.

[182] Q. Now, I guess you must have misunderstood Mr. Collins. His first question was did you know a patient or ever meet anyone by the name of Mr. Stansbury, and I thought you said you didn't know him or had not seen him. A. Was that the patient?

Q. Yes. A. I didn't say that I didn't know him. I know him after he got to the hospital. I mean, I had to know him because we had his

chart. We had to turn it over to the nurse.

Q. How long have you been working at Casualty Hospital? A. Been there seventeen years.

Q. Now, approximately how many patients do you have the occasion to bring up to rooms during the day? A. Well, --

THE COURT: Excuse me. He didn't bring this patient up.

MISS KENNEDY: He didn't?

THE COURT: I didn't understand him to say so.

MR. COLLINS: No.

THE COURT: You don't get any evidence from me, ladies and gentlemen, you get it from the witness only.

Mr. Witness, did you say you did bring this patient up?

[183] THE WITNESS: No, I brought the oxygen tent up. I was in charge of the oxygen tent. When a patient comes in, you have to have oxygen, and I am the one that calls for the oxygen tent.

BY MISS KENNEDY:

Q. Can you tell me, was the patient already in the room when you came in? A. No, I didn't say that. I was called for the oxygen tent.

Q. No, sir. Was the patient in the room at the time you came up with the oxygen tent? A. No, he wasn't.

Q. He had not been brought up? A. He was still in the emergency room.

Q. Where? A. He was in the emergency room.

Q. Now, do you know who brought the patient up? A. No, I can't remember who brought the patient up, but one of the orderlies. I don't know which one because I was anxious to get the tent up. I was very anxious to get the tent up so I disremember which orderly.

Q. Approximately how long after you had the tent up was the patient brought up? [184] A. Well, it wasn't too long after, but after five or six minutes before the patient came up and I had done put the tent up by that time.

Q. Was it your testimony that you did not help to undress him? A. I did. I helped to undress him. He didn't have all his clothes on. He just had his shirt on.

Q. When you placed him in the bed, all he had on was a hospital gown? A. That's right.

Q. There were no pants? A. No pants or nothing.

Q. And did he have any cigarettes in his hands? A. No, he didn't have anything in his hands because I asked him.

Q. Now, I think I asked you approximately how many tents then, do you have the occasion to put up, or how many such calls do you have per day to help patients get undressed and get in bed? A. Well usually at night I don't have too many, but just occasionally and some nights more and some nights less but usually around three or four, or something like that.

Q. Do you remember each one? Would you recall each one of the patients that you helped in 1962? [185] A. No I can't. I don't think I put over one that night.

Q. Well, now, when was this patient admitted? A. I would say, if I am not mistaken, it was on a Friday night.

Q. And did you testify on direct examination that the fire occurred the next night following his admission? A. Well, the fire was not that night and the next night was Saturday night.

Q. He was admitted on Friday night? A. Admitted on Friday night.

Q. And the fire didn't happen -- A. Until Saturday night.

Q. Is that right? A. That's right.

Q. Well, now, Mr. Stewart, could you be reasonably mistaken about --

THE COURT: It will be for the jury to determine that. You may ask him questions.

BY MISS KENNEDY:

Q. You are certain then? A. I am pretty sure it was -- that's quite a long ways -- a long time ago, but if I am not mistaken it was Friday night when he was admitted to the hospital.

[186] Q. And then the fire was the next night? A. The fire happened Saturday night, the next night.

Q. Do you smoke, Mr. Stewart? A. No, I don't.

Q. Did you observe whether or not there were any other patients in the room at that time? A. There were other patients and we also tell them all to --

Q. That is not responsive. Did you observe whether or not there were other patients in -- A. Yes there was.

Q. How many? A. Well, I just remember -- I think after I put him in the room, the room was filled.

Q. Do you recall how many other people were in the room? A. It was two other patients.

Q. So there were three people in the room? A. After I put him in there, he made three.

Q. Do you know whether anyone was smoking in the room when you put him in there? A. Not to my knowing.

[187] Q. Prior to you putting him in there, you said you had a conversation with other patients.

Did you go around and tell them not to smoke? A. Yes, I did.

Q. How did you say that? What did you say? A. I told the patients, I said, an oxygen tent is going on in there and you ought not to smoke, you are not allowed to smoke, and so they all said we know that.

Q. Did you proceed to gather up the cigarettes? A. I wasn't supposed to. All I was supposed to do was put the oxygen tent up and check on the patient.

Q. You don't know whether they had cigarettes in there or not, do you? A. No, I don't.

MISS KENNEDY: No further questions.
THE COURT: Mr. Collins?
MR. COLLINS: No questions.
THE COURT: You are excused.
MISS KENNEDY: Yes.
MR. COLLINS: Miss Kim, please.

BING SUN KIM

was called to the witness stand on behalf of the defendant, being duly sworn, was examined and testified as follows:

[188] DIRECT EXAMINATION

THE COURT: Please keep your voice up real loudly. This air-conditioning makes an awful racket and all the jurors have to hear you.
THE WITNESS: Yes.
BY MR. COLLINS:
Q. I will stand back here and you will see if you can talk to me way back here.
Would you state your full name, please? A. Bing Sun Kim.
Q. All right, where do you live, Miss Kim? A. I live in 1629 Columbia Road, Northwest.
Q. What is your occupation, Miss Kim? A. A nurse anesthetist.
Q. Where are you working now? A. D. C. General Hospital.
Q. How long have you been there? A. Around one year.
Q. All right. In December of 1962, were you a nurse at Casualty Hospital? A. Yes.
Q. Did you some time after 1962, did you leave Casualty Hospital and go to work at some other hospital? [189] A. No.
Q. Well, I will accept that.
In December of 1962, did there come a time when a patient by the name of Joseph S. Stansbury became a patient on your hall? A. Yes.
Q. Do you recall whether that was on December 8, 1962 or do you

recall the date? A. I can recall certain days but I can't recall how it happened.

Q. Did there come a time when one of the patients on your hall, in December of 1962, was burned? A. Yes.

Q. Now before he was burned, did you see that patient? A. Yes.

Q. Did you see him when he went in the room or some time thereafter? A. When he admitted that room, I have seen him. I told him not to smoke.

MISS KENNEDY: That is not responsive to the question.

THE COURT: You did see him at the time he was admitted?

THE WITNESS: Yes.

[190] BY MR. COLLINS:

Q. When you saw him, can you describe -- when he was admitted, can you describe his condition? A. Yes. His condition wasn't looking bad.

Q. His condition was what? I am sorry. A. He wasn't looking bad, but doctor ordered him heart condition, so he was in oxygen tent.

Q. Do I understand you mean when you say he wasn't looking bad, he didn't look bad? A. Excuse me. I am not say which one patient -- I cannot say which one patient was bad or good. He can walk. He can talk. Whatever we told him, he can do what he should.

Q. All right. Now are you saying he understood? A. Yes.

MISS KENNEDY: I will object to leading the witness like this, Your Honor.

MR. COLLINS: Your Honor, I think --

THE COURT: What do you mean, did he or did he not understand what you meant?

THE WITNESS: What kind of condition he asking to me, I cannot -- I don't know which level he ask.

MR. COLLINS: Your Honor, if I may --

THE WITNESS: He can detail to ask me. I can say yes or no.

[191] MR. COLLINS: I think, Your Honor, the lady has been trying to tell us certain things and --

THE COURT: I think we understand the circumstances.

MISS KENNEDY: May we approach the Bench?

THE COURT: Yes.

(Bench Conference.)

MISS KENNEDY: If Your Honor please, I think to ask whether or not this man understood, number one, is an improper question and it calls for the operation of another person's mind, and plus the fact that she doesn't understand English and she wouldn't know whether he was understanding or not, because she couldn't communicate with him.

THE COURT: All right. Let's do it this way and I think this is reasonable under the circumstances: You can certainly ask if she asked any questions or he asked any questions, and if he replied responsively to those questions. I don't think you can do it in any other way, can you?

MISS KENNEDY: No, Your Honor. The only thing that bothers me is that if she -- in 1962 she must have spoken even less.

THE COURT: Now, I can't speculate any more than you can. We will take the witness as she is now on the evidence before us.

[192] I think you are entitled to some latitude.

(End of Bench Conference.)

BY MR. COLLINS:

Q. Before the accident, did you talk with Mr. Stansbury? A. Yes.

Q. What did you say -- strike that.

What did he say to you?

MISS KENNEDY: I object. She has not said that he said anything.

MR. COLLINS: All right.

BY MR. COLLINS:

Q. Who spoke, you or Mr. Stansbury, or both? A. I am sorry, I don't understand.

THE COURT: Did you speak to him?

THE WITNESS: Yes.

THE COURT: Did he speak to you?

THE WITNESS: Yes.

BY MR. COLLINS:

Q. What did he say to you? A. He didn't say much. He didn't ask me anything. I told him --

Q. What did you say to him? A. Okay. I told him because he in oxygen tent not to [193] smoke and that was all, and then he said, yes, he would listen and everything.

Q. Now, do you recall about what time that was that you spoke with him? A. I'm not sure precise time.

Q. Let me ask you a question: When you were working at the hospital then as a nurse, did you keep notes, nurse's notes? A. Yes.

Q. And did you keep those notes as you went along and worked in the evening? A. We have record, yes.

Q. All right. I show you what is part of Plaintiff's Exhibit No. 1, and it is headed Nurse's Notes. Do you recognize that handwriting? A. We have a ward clerk. She records it.

Q. Would you look at --

MISS KENNEDY: I object. I think she testified that she did not keep them.

THE COURT: He has not gone to context.

BY MR. COLLINS:

Q. Now, would you look at the next page, please? A. Yes.

[194] Q. Is there a signature on the next page? A. Yes.

Q. Whose signature is that? A. My signature. Can I explain to you?

Q. I don't know whether the other side would like it.

Let me ask you this: When the clerk makes out the record, does she make the record out on the basis of what you tell her? A. Right.

Q. And then after she makes out the record, do you look at it and then if it is correct, do you sign it? A. Yes.

Q. And I understand that is your signature there? A. Yes.

Q. Okay. Would you please look at the -- all right. I will leave it there for right now.

Does that record that this lady, this clerk, makes out on the basis of what you tell her, and that you read over and then sign if it is correct, does that show or keep a record of some of the times that you see a particular patient? A. I don't understand. I am sorry.

Q. Is there a record kept? A. Yes.

[195] Q. Let me finish. Of the times that you as a nurse see a patient? A. Yes.

Q. And is it written in terms of eight o'clock, 8:30 or nine o'clock, or things like that? A. Yes.

Q. And does it tell then what you observed or what you did with respect to the patient? A. Yes.

Q. Is that what that record is in front of you for that evening of December 8, 1962? A. Can I read it again?

Q. Yes, please do.

(Whereupon the witness read the report to herself.)

BY MR. COLLINS:

Q. Does the record accurately reflect what you did that evening? A. Yes.

Q. Now, you mentioned to us that you were a nurse? A. Yes.

Q. On December 8, 1962 were there any nurse's aids that helped you or were under your direction or anything like that? A. Yes.

[106] Q. About how many nurse's aids do you have? A. Oh, around ten nurse's aids on my floor.

Q. What is -- strike that.

What was their duty that night? A. Well they were needing nursing care. I couldn't reach the patient and then I -- patient needed nursing care, like for example, a change. If patient wanted one more blank-

et or water or a bedpan, whatever needed them, I can give all patients and she can help me with nursing care for the patient.

Q. Now, did there come a time that evening when there was a fire? A. What time?

Q. That evening. The evening that Mr. Stansbury came to the hospital, was there a fire that evening? A. Yes.

Q. All right. Do you recall where you were when you learned that there was a fire? A. Yes.

Q. Where were you? A. I was in medicine closet.

Q. What did you do? A. Yes. I was counting the narcotics to prepare for the report for eleven o'clock shift.

[197] Q. What did you do when you learned there was a fire? A. Now I can explain?

Q. Yes. A. Okay. The narcotics room is right next to patient burned room. I heard something strange sound and so I asked one of nurse's aids check him and one of the nurse's aids, and I can't recall her name, and she get there and she yell, fire, and so we all go out and extinguish fire.

Q. All right. How was the fire extinguished? A. Disconnected oxygen and put over blanket patient. Patient had gown caught in fire. I tried to get -- untie it and take off hospital gown, and opened the window and to air out.

Q. Was the patient burned? A. Yes.

Q. Was anyone else burned? A. No, oh, myself burned.

Q. Did there come a time when you asked the patient what had happened? A. Yes. I asked him right away, and after fire is gone, what happened, and he said he tried to get a cigarette lit on and all of a sudden it caught fire.

MR. COLLINS: Nothing further, Your Honor. I would [198] like to read this record to the jury.

THE COURT: If it is in evidence, sir, you have a right to subject to the understanding of counsel, of course.

MR. COLLINS: Very well. The record is on 12-8-62, and it begins -- you may look at it later.

Begins 7:30 a.m. male admitted per wheelchair, room 226. Made comfortable. CBC and urinalysis requested. Not obtained. Complete bed rest with side rails, and T9829220B/P, 140 over 180. Oxygen tent maintained. Laboratory work, x-rays and medications ordered.

8:00 o'clock. It is a word that I can't prounounce. It is spelled m-a-r-c-a-h-y-d-r-i-m, 2 ccs given.

8:25 p.m., care given.

10:00 o'clock, nembutal, and quiss with a line over the top.

10:15, patient in oxygen tent trying to smoke. Oxygen tent caught on fire. Patient in room called for help. Miss Kim, patient with nurse's aid in room. Fire put out. Miss Emert notified. Firemen here. Doctors here. Skin tests given for antitoxin. Patient allergic. Red area appeared on arm. Then something, 1cc is given.

10:30 p.m., patient dressed with vaseline, complaining of chills. Blanket supplied, ace bandage applied to leg.

[199] Instant report filled out. Kim nurse.

Nothing else, Your Honor.

THE COURT: Mrs. Kennedy.

MISS KENNEDY: Would the Court indulge me for a moment, please?

THE COURT: Yes.

CROSS EXAMINATION

BY MISS KENNEDY:

Q. Now, Miss Kim, did you see Mr. Stansbury with a cigarette in his hand? Did you see the patient with a cigarette? A. No.

Q. Did you see him smoking? A. No.

* * *

[204] Q. Then who was supervising it while he was under the tent? Were you in charge of the oxygen tent? A. For the patient, yes.

Q. I see. A. Yes.

Q. The patient could not operate it himself? A. Oh, no.

Q. Now, again, may I refresh your recollection and maybe this will do it. We have here notes which have been introduced into evidence and at 12:10, last rites given by Father Bryan. Does that refresh your recollection? A. I am sorry.

Q. You can read English? A. Yes.

Q. What does this say right here? A. 12:10, this is not my shift. After fire, eleven o'clock, we have report, and after twelve o'clock somebody else come into take care of him. After that I don't know.

[205] Q. I see. So, therefore, you were not there when the last rites were given, is that right? A. Right, and eleven o'clock -- 11:30 my duty was finished that evening because caught in fire and so I didn't -- I couldn't give the report.

Q. Very well. 12:05 now -- did I ask you, Miss Kim, were you present when -- no, I asked you that, I will withdraw that question.

Approximately how long did you stay with the patient after he was placed under the tent? A. Oh, I didn't stay with him very long. I give him instructions. I had to give other patient medicine and medication. Ten o'clock would be sleeping pills all given. Patients should be in bed and so I didn't stay with him very long time. I can't recall how long, but I talked with him and I had to leave him.

Q. All right. Do you recall giving Mr. Stansbury any sleeping pills or any other medication? A. I recall he had nembuttal which is sleeping pill. He had ten o'clock.

Q. You gave him a sleeping pill at ten o'clock? A. Yes.

Q. Now, I think you testified you had ten other nurse's [206] aids to assist you? There are ten other people besides you there? A. Yes.

Q. And did you know, Miss Kim, Mrs. Emert? A. Mrs. Emert, I suppose supervisor whole hospital that evening.

Q. Very well. All right. Did you assign any one of these ten persons to watch Mr. Stansbury while he was in the oxygen tent? A. Yes.

Q. You did? You had someone there watching him while he was in the tent? A. Yes.

MISS KENNEDY: I have no further questions.

THE COURT: Mr. Collins?

MR. COLLINS: Nothing further, Your Honor.

THE COURT: You may step down. Thank you.

MR. COLLINS: You are free to go, Miss Kim, thank you very much.

* * *

[209] EDWIN O'GRADY ALLEN, JR.

* * *

DIRECT EXAMINATION (Continued)

BY MR. COLLINS:

Q. Mr. Allen, when we broke up for lunch, I believe you told us that in December of 1962 you were the Southern Oxygen Company and that you supplied various apparatuses to Casualty Hospital and that you happened to be there on this particular day. You just happened to be there? A. Yes, that is correct.

Q. And while you were there you learned of --

MISS KENNEDY: I object to him leading the witness.

THE COURT: That is already in the record, he is just bringing him up to where we broke for lunch.

MISS KENNEDY: I see.

BY MR. COLLINS:

Q. Did there come a time while you were there that day that you learned there had been an accident with respect to a man in an oxygen tent? [210] A. Yes.

Q. Did you see the man that day? A. Yes, I did.

Q. Was he in bed at that time? A. Yes.

Q. Was anyone with you there when you saw him? A. Yes, Eliza-

beth Rogers, the administratrix and Mr. Paul Vogen, the assistant administrator of the hospital.

Q. Was Mr. Stansbury asked about the accident at that time? A. Yes, he was.

Q. What did he say as best you can recall? A. The best I can recall, and this will of course be not an attempt to give an exact quotation, but Mrs. Rogers asked the patient if he had lit a cigarette, and he said that he had, and she asked him why he had done it, and his reply was, that it was a very foolish thing to do, and here again, not an exact quotations, but this is in essence of what he said.

Q. Now, did you then check the equipment? A. Yes, I was requested to inspect the apparatus to determine if anything was functionally wrong with it.

Q. Did you look at the apparatus? [211] A. Yes, I did.

Q. What was its condition? A. Well, I made a superficial examination of the inside of the cabinet of this machine, and I saw no visible signs of damage in any way, and I plugged the machine in and turned it on and it functioned all right.

Q. I take it then, that they continued to use the machine? A. Yes.

Q. Speaking of this machine, was this a kind of machine that requires tank oxygen for its use or is it plugged in or how? A. It can operate either way. In this particular case, I believe, this section of the hospital has piped oxygen with the wall valve so the connection can be made to go into the system.

Q. Had you ever seen Mr. -- did you know that this gentleman was Mr. Stansbury? A. No, I did not.

Q. Had you ever seen that man before? A. Well --

Q. Did you ever see him after that? A. No.

* * *

[215] BEN HICKLIN

was called to the witness stand on behalf of the defendant, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

Q. Now, would you speak up sir, and talk to me back here and would you please state your name. A. Ben Hicklin.

Q. Where do you live, Mr. Hicklin? A. 233 Seventh Street, Northeast.

Q. Are you employed? A. Yes, that's right.

Q. Where do you work? A. Casualty Hospital.

* * *

[218] Q. What was your conversation with Mr. Stansbury? Tell us about it. A. Well, I didn't have a conversation with him until the next morning after this accident.

Q. All right. What was the conversation that you had?

THE COURT: Talk a little louder.

THE WITNESS: When I went to work that morning, I went into his room, and not only that particular room, but --

MISS KENNEDY: May we approach the Bench, please, before his testimony?

THE COURT: Yes.

(Bench Conference.)

MISS KENNEDY: Your Honor, I really should have objected before but I see this is continuing. As Your Honor ruled previously in this trial that unless it is part of the res gestae, I don't think that --

THE COURT: No. I understand this to be a conversation between Mr. Stansbury and this man. I think that is proper.

MISS HADEN: Proper groundwork has not been laid because this man said he worked on the other side of the hospital.

THE COURT: I didn't understand that. You might be right, but he has said that he talked to him and he talked to [219] him the morning after the accident, I think he said. I think that is proper.

MISS KENNEDY: If Your Honor please, the only predicament it puts the plaintiff in is that we don't have the opportunity to cross-examine this man with respect to his credibility.

Mr. Stansbury is dead. If we knew of this witness and Mr. Stansbury didn't die until 1965 and I think maybe we would have called upon him to take the deposition during the lifetime of Mr. Stansbury, and then we would --

THE COURT: You did take the deposition.

MISS KENNEDY: But none of these witnesses -- how could we rebut or refute this? I realize this is a question of credibility.

THE COURT: At the present time, it is a question of whether this is admissible or not, and I think it is admissible.

(End of Bench Conference.)

THE COURT: Keep your voice up, sir.

Did I understand you to say that you went in the next morning?

THE WITNESS: That's right.

BY MR. COLLINS:

Q. You went in the next morning and you had a talk with [220] Mr. Stansbury, tell us about that. A. Well, usually every morning when I go, I would go around and check all the patients, you know, and speak to them. This is every morning.

And so when I went in that morning, then I seen what condition he was in, and then I asked him what happened?

Q. What did he say? A. He said that he decided to get a couple draws of a cigarette and when he struck his match, that was it.

Q. Did you have any other conversation with him? A. No, sir, I went out.

Q. Did you see Mr. Stansbury after that from time to time? A. Sure, around in the hospital there.

MR. COLLINS: Nothing further, Your Honor.

THE COURT: Miss Kennedy.

CROSS EXAMINATION

BY MISS KENNEDY:

Q. Now sir, I think you have said that you had a conversation with Mr. Stansbury. What time of day or night was this? A. This was early in the morning.

* * *

[222] Q. Do you smoke? A. Yes, ma'am.

Q. What kind of cigarettes do you smoke? A. Well Tarreyton's.

MISS KENNEDY: I have no further questions.

THE COURT: Is that all, Mr. Collins?

MR. COLLINS: That is all.

THE COURT: You may step down. You are excused if you want to be. You may have a seat in the courtroom, or you may go.

THE WITNESS: Thank you.

MR. COLLINS: May I have the hospital record now?

Will Your Honor indulge me for a moment please?

THE COURT: Yes, sir.

MR. COLLINS: I wonder if I, at this time, if I might read two other excerpts from the hospital records?

THE COURT: Yes, sir.

MR. COLLINS: This appears at about the fourth page of the hospital record and it is entitled 'Hospital regulations complete and report consultation within twenty-four hours with receipt of request. Request for consultation to surgical service, and then a printed form, summary of present findings, [223] and then it is written, "62 year old white male admitted for CHI" and I think it is -- I think patient states he tried to smoke while in bed and sustained first and second degree burns on neck chest and left upper extremities. The date is 12-10-62 and it is in the a.m. and is signed by a physician whose name I frankly can't make out.

The next entry is further on in the record, and I guess about one-third of the way, and it is on a page called Progress Notes made out by another doctor, and it is 12-9 and it states patient has first and second degree burns from something scalp, from neck, upper chest wall, and upper extremities from lighting cigarette inside the 0-2 tent. P.E. 100 over 80, P.N. 96/ and another notiation I can't make out.

I can't read the rest and it is signed by a doctor who signs his name with a "E" and something after it and I can't make out his signature.

Your Honor, with that the defendant rests.

THE COURT: Very well. You may proceed with anything further, Miss Kennedy.

MISS KENNEDY: Nothing further.

THE COURT: Ladies and gentlemen we will excuse you at this time, temporarily, with the same admonition, please.

[224] (The jury was excused from the courtroom.)

MR. COLLINS: Your Honor, at this time, I renew the motion of the defendant for a directed verdict. All the evidence is in in the case now and we have shown what we know with respect to this accident

The hospital records contain a couple of notes from a couple of physicians as to what was told to them and other people told what was told to them with respect to the accident, and I do not think, as the record presently stands, that there is any evidence that we did anything wrong or failed to do something that we should not have done.

I am fearful that if the jury receives this case, that it can only guess or speculate as to whether there was anything that we did wrong, and there was something that we failed to do, and for that reason, I think, it would be pure conjecture for them to have the case, and I move for a directed verdict.

THE COURT: Miss Kennedy.

MISS KENNEDY: May it please the Court, we are asking Your Honor to deny the defendant's motion for a directed verdict.

There are certainly, and I think that by their defense or testimony, they have certainly put on more facts into the [225] record that should be decided by the jury.

We still have the deposition of the defendant -- of the plaintiff, Mr. Stansbury, who said that he had blacked out and said he was unconscious, and I am using his terms, that he had blacked out, that he was unconscious shortly after he was admitted to this hospital for the next five or six weeks, and that he doesn't remember anything.

Now, the defendant has put on some testimony tending to show that they had a conversation with this man. Unfortunately, it is a question of credibility because Mr. Stansbury isn't here to deny that, but that still raises a question of fact.

Miss Kim, who took the stand, said that she gave Mr. Stansbury a sleeping pill shortly after he was admitted. She also gave him some digitalis and then she put him in the oxygen tent and went out.

Now, they have introduced several witnesses here who have said Mr. Stansbury was smoking a cigarette. Where did he get a cigarette from? Who gave Mr. Stansbury the cigarette? Of course, I think not only is negligence inferred from the very fact that they claim -- there are many reports there, but they have not brought the first defense witness up here to really say that they saw him smoking and yet they are [226] saying that Mr. Stansbury did smoke.

THE COURT: They are saying that Mr. Stansbury said that he did smoke.

MISS KENNEDY: But in Mr. Stansbury's deposition, he said, he did not remember anything from five or six weeks, and that he did not smoke, and that certainly is a question of fact.

The hospital owes the patients such reasonable care and attention for their safety as their mental and physical condition, if known, may require, and that this care should be commensurate with the known inability of the patient to take care of himself.

Now, he is in an oxygen tent as they have described it with his hands in there and they took away cigarettes and what have you and where did he get another cigarette? Who saw him smoking? Is this just a defense to get a verdict -- a directed verdict or is this a question of credibility?

The proximate cause of injury. Proof of negligence --

THE COURT: What are you reading, please?

MISS KENNEDY: Your Honor please, I am reading from Christie v. Callahan.

THE COURT: What were you reading prior to that?

MISS KENNEDY: I was reading from Daniel Community [227] Hospital v. Thompson, 186 Va. 746, 43 S.E. 2d, 882.

Christie v. Callahan, 75 U.S. Appeals, D.C., 133, 124 F.2d, 825, and that held that proof of negligence or causation need not be established by testimony so clear that it excludes every other speculative theory.

* * *

[239] THE COURT: All right. They are not withdrawn as was suggested, but they are reinserted and I will deny them in light of counsel's statement that he is not going to contend, by argument or otherwise, that your man was contributorily negligent. He is really in essence saying that you have not shown negligence in that the proximate cause thereof was the [240] act of the plaintiff.

* * *

THE COURT: Let me go back and see what we have here.

I will certainly say that the duty is on the defendant to exercise reasonable care and that duty may be breached by either affirmative acts or omissions.

* * *

I am going to deny thirty-two. On the evidence in this case, I think, to permit the case to go to the jury as to [241] earnings, would leave to speculation and conjecture which is not the function of the jury.

* * *

[243] JURY CHARGE

THE COURT: Ladies and gentlemen, it will soon become your duty to retire to the jury room, select your foreman or forewoman and determine the issues in the case.

By now, I am quite sure, that each of you know that this is a survival action by Mary G. Stansbury as Administratrix of the Estate of Joseph S. Stansbury, deceased, for personal injuries and damages alleged to have been sustained by the said Joseph S. Stansbury, due to the alleged negligence of the defendant hospital.

This is not an action for wrongful death. Therefore, there is no claim against the hospital in connection with Mr. Stansbury's death, and hence you will not be concerned therewith.

[244] Plaintiff claims that the defendant hospital failed to exercise reasonable care for the safety of the plaintiff decedent under all the circumstances, and that its negligence, the hospital's negligence, proximately resulted in the injuries and damages claimed and that the defendant hospital is therefore liable to respond in damages.

The defendant hospital denies any negligence on the part of its agents, servants or employees, causing the fire, denies any defect in its equipment causing the fire, and asserts that the alleged injuries and damages were due to the sole negligence of the plaintiff decedent, Mr. Stansbury.

The defendant hospital further asserts that said Stansbury was smoking at the time of the fire and knowing the danger thereof, and contrary to instructions given to him.

The plaintiff further asserts that the hospital knew Mr. Stansbury's condition and allowed him to smoke, and further, failed to prevent the plaintiff decedent from having access to matches and to prevent Mr. Stansbury from smoking, and therefore, it failed to exercise reasonable care for the safety of Mr. Stansbury.

These are the respective contentions of the parties.

As you doubtlessly know, it is the duty of the Court to instruct you as to the law of the case, namely, the rules [245] and principles which will guide you in determining the issues in the case, and furthermore, that you are bound to follow those rules and principles.

On the other hand, you ladies and gentlemen are the sole judges of the facts, and it will be for you to determine all issues of fact from the testimony adduced from the witness stand and reasonable inferences to be deduced from proven facts and in conformity with your recollection thereof.

Counsel for the plaintiff and counsel for the defendant each have the right to make what we call opening statements, indicating to you what they hope they will be able to show for their respective sides, and then at the conclusion of the case, to sump up, indicating to you what they believe in fact they have been able to show for their respective sides.

Now, this is a right and privilege of both counsel. The Court merely states to you that statements of counsel, whether it be for the plaintiff or for the defendant, do not constitute evidence in the case, and furthermore, if your recollection be at variance with their recollection or for that matter the Court's recollection, if any be expressed by the Court as to the facts, it is your recollection which controls, not counsel and not the Court's recollection for the reason that you are the sole judges of the facts.

[246] Inasmuch as you are the sole judges of the facts, so too are you necessarily the sole judges of the credibility of the various persons who have testified before you, and what does this mean?

This merely means worthiness of belief, and how do you determine this?

In determining whether to believe the testimony of any witness and in weighing his testimony, you may consider his demeanor on the stand, his manner of testifying, whether he impresses you as having an accurate memory and accurate recollection, whether he impresses you

as a truthtelling individual, his apparent candor and fairness or lack of it, the interest which he may have in the result of the trial of the case, if any, his bias or prejudice for or against either party, if any be shown and his opportunity of knowing the facts and circumstances about which he has testified, and then from all these facts and circumstances it becomes your duty to give the proper weight to the testimony of each and every witness who has testified before you.

By evidence in the case, you will, of course, understand that it is not only the testimony which comes from the witnesses on the stand, but that which comes before you either by stipulation or by the use of a deposition.

[247] As to the matter of deposition: In the present action certain testimony has been read to you by way of deposition. You are instructed that this testimony is entitled to the same consideration, the same rebuttable presumption that the witness speaks the truth, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand, and you are not to discount it merely because it comes to you in the form of a deposition.

Now, evidence may be either direct or circumstantial. Indeed, in the ordinary affairs of life as well as in Courts of law when issues be presented, those issues may be resolved by the use of either direct or circumstantial evidence or a combination of the two.

Now, direct evidence, for example, is evidence of a witness himself as to what he saw or heard as an eye witness of the matter under consideration.

Indirect or circumstantial evidence consists of those facts which may be logically inferred from proven facts.

In other words, circumstantial evidence or indirect evidence is composed of proved facts which raise a logical inference as to the existence of the fact that is in issue in [248] a particular case, and which by experience has been deemed to be so associated with that fact as to

permit a justifiable or satisfactory conclusion.

Now you are instructed further that if you find that any witness, whether for the plaintiff or for the defendant, has testified falsely and knowingly as to a material fact about which he or she could not be mistaken, then you may, if you deem it wise to do so, disregard the entire testimony of such witness or any part of the testimony of such witness or witnesses except where you find it corroborated by other credible testimony.

As counsel have very properly said to you, this is a civil action, and in a civil action, the plaintiff carries the burden of proof, and that burden is carried by what we call a preponderance of the evidence, that is, by the most convincing evidence.

To use a homely example, if you will assume with me that you have an old apothecary scale with a crossbar, chains on each side and at the ends thereof a pan. If at the conclusion of the case the pan holding the plaintiff's evidence weighs more than the defendant's, meaning that that pan goes to a lower level than the defendant's, then the plaintiff will have sustained his or her burden.

[249] If, on the other hand, at the conclusion of the case the pans be even or if the defendant's pan with his evidence goes lower than the plaintiff's, then the plaintiff will not have sustained his or her burden by a preponderance of the evidence.

So much for certain general principles of law having applicability to most civil cases which come before a jury for consideration and determination. I now turn to the specific rules and principles having application to this case.

This is, as counsel have said, an action based on the alleged negligence of the defendant hospital. I shall now deal with the law applicable thereto under the facts of this case.

First, you are instructed that no presumption of negligence arises from the mere happening of an accident.

On the other hand, we start with the legal presumption that people exercise due care, and you are further instructed that you may not speculate or conjecture on whether the defendant was negligent or not.

You are further instructed that a defendant is not an insurer of the plaintiff's safety. It is the duty of the hospital [250] to exercise reasonable care for the safety of its patients under known conditions and circumstances which have been shown to you through the evidence in the case.

You are further instructed that intent is not an essential element of negligence, neither intention to injure another person nor intention to violate the law nor intention to do or not to do any particular act is necessarily involved, although it may be involved from the failure to exercise ordinary care.

I repeat to you, the duty on the part of the hospital is to exercise reasonable care for the safety of patients under the known circumstances as have been shown to you, and as you may conclude, and not counsel and not the Court.

You are further instructed that oxygen vapors are inflammable and may be explosive when used under certain circumstances without safeguards. It, therefore, was the duty of both the plaintiff and the defendant to exercise reasonable care in connection with it under all the facts and circumstances in the case.

In general, it is the duty of the hospital to give a patient such reasonable care and attention as the patient's known condition requires, and this duty is measured by the degree of care and skill and diligence customarily exercised by hospitals generally in the community under similar circumstances, and the hospital owes to a patient such reasonable care and attention for their safety as their mental and physical condition, if known, may require, and that this care should be commensurate with the known condition of the patient and the effect, if any, on his ability to take care of himself.

To sum up, it is the duty of a defendant to exercise reasonable care for the safety of its patients, such care as would a reasonable hospital, through its agents, servants or employees exercise for the safety of its patients under the same circumstances.

Now, this makes it necessary for the Court to define for you what is meant by negligence, or what constitutes negligence.

Negligence is the doing of some act which a reasonably prudent person, under the same circumstances would not do or failure to do something which a reasonably prudent person would do under the same circumstances, activated by those considerations which ordinarily regulate the conduct of human affairs.

In short, negligence is the failure to use ordinary care in the management of one's property or person.

You will note that the person whose conduct is set up [252] as a standard is not some exceptional person. It is not a person peculiarly endowed with qualities of perfection or an exceptionally skillful person but it is a person of reasonable and ordinary prudence. Negligence is not an absolute term, but a relative one inasmuch as a reasonably prudent person will react differently under different circumstances, and the amount of care he uses will vary in direct proportion to the danger known to be involved in its undertaking, it follows, that in the exercise of reasonable care, the amount of caution required by the law varies in accordance with the nature of the act, the relationship of the parties, and the circumstances under which the act was done.

An act of negligence under one set of conditions might not be negligence under other conditions. Therefore, in order to arrive at a fair standard we ask what conduct might be expected of a person of ordinary prudence under the same circumstances, and our answer to that question gives us the criterion by which to determine whether or not the evidence before the jury proves negligence.

If you find that the plaintiff has failed to prove that the defendant

was negligent, then your verdict would be for the defendant and you would need to go no further.

If you find, however, that the plaintiff has carried the [253] burden of proof, and shown by a preponderance of the evidence that the defendant was negligent, then you have for your consideration whether such negligence proximately caused the alleged injuries and damages alleged.

Now, this makes it necessary for the Court to define for you what is meant by proximate cause.

The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred.

It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies into motion. The proximate cause of an accident is that cause without which the accident would not have happened.

If you find that the plaintiff has proved by a preponderance of the evidence that this defendant was negligent, and you further find from the evidence that by the same quantum of proof the plaintiff has proved that such negligence was the proximate cause of the injuries and damages alleged to have been sustained, then you will have for your consideration and determination what injuries and damages this plaintiff in fact sustained as a proximate result of the negligence, if you so find, of the defendant.

In connection with the matter of damages, you are instructed that it is the duty of the plaintiff to prove by a preponderance of the evidence such damages and injuries as it alleges it has sustained. Here again, you may not speculate or conjecture but your determination must be based on the evidence in the case.

If you find that the plaintiff is entitled to recover, you will consider in fixing the amount of the award the following elements of damages:

1. What expenditures were required in connection with the injuries alleged to have been sustained here, the hospital bills, doctor bills and the like.

In addition, you will have for your consideration and determination what physical injury, by way of disability or disabilities enused from the injuries sustained, if you find that the defendant was negligent.

When you ladies and gentlemen took your places in the jury box each of you swore that you would determine the issues in this case from the testimony adduced from the witness stand and reasonable inferences to be deduced from proven facts, and in conformity with your recollection thereof.

You are not to be motivated in reaching your verdict [255] by any bias or prejudice for or against either party, and similarly you are not to be motivated by any sympathy.

You are instructed, according to the mortality table, the expectancy of life of one age 65 years is 12.8 years.

This fact, of which the Court takes judicial notice, is now in evidence to be considered by you in fixing damages, if you find that plaintiff is entitled to a verdict.

However, this one factor of evidence is not by law controlling, but should be considered in connection with all the other evidence bearing on the same issue, such as that pertaining to the health habits and activity of the person whose life expectancy is in question.

I should advise you that under the statute in the District of Columbia a plaintiff in a survival action is not entitled to recover for any pain and suffering which he might have suffered, even if it be the proximate result of the defendant's negligence.

In other words, you do not have nor can you consider the element of pain and suffering. It is not in a survival action.

The possible verdicts in this case are: (1) for the defendant, or (2) for the plaintiff. If for the plaintiff, you will state in what amount.

[256] Whatever your verdict may be, it must be unanimous.

* * *

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,734

MARY G. STANSBURY, Administratrix
of the Estate of JOSEPH S. STANSBURY,

Appellant,

v.

CASUALTY HOSPITAL,
A Corporation,

Appellee.

PETITION FOR REHEARING

The appellant, by her attorneys of record petitions the Court sitting en banc to grant a rehearing in the above entitled cause and upon a rehearing and further consideration thereof that the Judgment entered herein on the 21st day of October, 1967, be reversed and entered in favor of appellant, and for grounds of this petition states as follows:

1. That the appellant was substituted as plaintiff in the Court below after the death of her husband, Joseph S. Stansbury on the

28th day of February, 1965, who had filed action for damages against the appellee on the 8th day of August, 1963 for injuries he had received while a patient in appellee hospital. In its Answer, appellee admitted that the accident complained of had occurred.

2. At pre-trial the parties agreed that decedent had been admitted as a heart patient to appellee hospital on December 7, 1962 and was severely burned on the same day in an oxygen tent.

3. Appellant stated at pre-trial and at trial that she would rely on the doctrine of res ipsa loquitur. On the day of trial which began September 15, 1966, the cause was fully tried by a jury. At the conclusion of appellant's evidence appellee made a Motion for a directed verdict. The Court denied the Motion.

At the conclusion of all the evidence appellee moved the Court for a directed verdict, which the Court denied. The case was submitted to the jury. The Court instructed the jury orally as follows:

1. That they were the sole judges of the facts and of the credibility of the witnesses.

2. That circumstantial evidence is composed of proved facts which raise a logical inference as to the existence of the fact that is in issue in a particular case and which by experience has been deemed to be so associated with that fact as to permit a justifiable or satisfactory conclusion.

3. That the testimony read from the decedent's deposition was entitled to the same consideration as that of other witnesses.

4. That if they deemed it wise to do so to disregard the testimony of a falsifying witness.

5. That intent is not an essential element of negligence.

6. That oxygen tents are inflammable and may be explosive.

7. That the duty of the hospital is to give a patient such reasonable care and attention for their safety as the known condition requires, and this duty is measured by the degree of care and skill and diligence customarily exercised by hospitals generally in the community under similar circumstances.

On the 19th day of September, 1966, the jury retired to consider their verdict and thereafter on the same day returned the following verdict: $17,120.50 in favor of appellant. Judgment was rendered on the verdict as follows:

> "This cause having come on for hearing on the 15th day of September, 1966, before the Court and a jury of good and lawful persons of this district, who after having been duly sworn to well and truly try the issues between Mary G. Stansbury, Administratrix of the estate of Joseph S. Stansbury, plaintiff, and Casualty Hospital, a corporation, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 19th day of September, 1966, that they find the issues aforesaid in favor of the appellant and that the money payable to her by the appellee by reason of the premises is the sum of $9,120.50 hospital and doctors' bills, plus $8,000.00 damages or a total sum of $17,-120.50.
>
> "Wherefore, it is adjudged that said appellant recover the sum of $9,120.50 hospital and doctors' bills plus $8,000.00 damages or a total of $17,120.50, together with costs."

A motion for judgment notwithstanding the verdict was filed by defendant on September 28th, 1966, which was granted October 21st, 1966.

All of the evidence concerning what transpired was not on one side. There was room for doubt. There was complete contradiction as to the physical and mental condition of the decedent at the hour

of the accident on December 7th, 1962. Fairminded men could have honestly differed as to the conclusions which were drawn from the proof. The appellant produced substantial competent evidence, which the trial court could not weigh but should have accepted as true all evidence which supported the view of the appellant and should have given her the benefit of all legitimate inferences which were drawn therefrom in her favor.

A motion for judgment notwithstanding the verdict presents only questions of law and may not be granted on ground that verdict is against weight of evidence. *Crusade v. Capitol Transit,* 8 A.L.R.2d 229 (Mun. Ct. App. D.C. 63 A.2d 878).

The Court in granting judgment n.o.v. which only raises questions of law, usurped the function of the jury and thereby deprived the appellant of her constitutional right of a trial by jury. The Court in considering all the evidence and all reasonable inferences therefrom would have had to find that there was nothing at all upon which the jury had to base its verdict in order to grant a judgment n.o.v. *Hall v. Chicago & Northwestern R. Co.,* 50 A.L.R.2d 661, 5 Ill. 2d 135, 125 N.E.2d 77.

The jury, having heard the contradictory evidence and weighed it and after deciding as to the credibility of the witnesses, having listened to the Court's instruction and brought back a verdict in favor of the appellant, had fulfilled their province. The Court's duty was not to weigh the evidence but to consider it in the light most favorable to the appellant.

Federal appellate Courts do not review jury verdicts, but only rulings of the Judge which may have affected the verdict. Appellant believes that this appeal should be reheard by the full Court.

In conclusion, appellant respectfully requests this Honorable Court sitting en banc to rehear the above mentioned point in her appeal and reverse the decision below and enter judgment for appellant.

Respectfully submitted,

A. Lillian C. Kennedy
Mabel D. Haden
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay.

A. Lillian C. Kennedy

CERTIFICATE OF SERVICE

This is to certify that a copy of the Petition for Rehearing was mailed to Jeremiah C. Collins and James A. Hourihan, Attorneys for Appellee, at their office address, 815 Connecticut Avenue, N. W., Washington, D. C., this 26th day of June, 1967.

A. Lillian C. Kennedy